Supreme Court, U.S.
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No. __-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

HENRY LEE HUNT,

Petitioner,

—v.—

R.C. LEE,
Warden, Central Prison, Raleigh, North Carolina,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 21, 2002

104 pp

CAPITAL CASE

Questions Presented for Review

Petitioner Henry Lee Hunt was convicted and sentenced to death in a North Carolina court for the murders of Jackie Ransom and Larry Jones. At trial, the State's theory as to why petitioner killed Larry Jones was that Jones had been telling the police that petitioner killed Jackie Ransom. Later, the two police officers who interviewed Larry Jones testified that Jones never implicated petitioner in Jackie Ransom's death. Yet the State never disclosed this evidence to petitioner's court-appointed lawyers. During the penalty phase of petitioner's trial, his lawyers introduced no mitigating evidence, conceded the existence of aggravating circumstances, and based their entire argument on moral and religious themes not particularized to petitioner or the crimes of which he was convicted. The questions presented by this petition are:

> Whether a defendant receives professionally competent assistance of counsel when during the penalty phase of trial, counsel relies solely on general moral and religious arguments and declines to present any argument specific to defendant's individual circumstances. The Fourth Circuit answered this question yes, and the Seventh Circuit answered it no.

> Whether the State's obligation to disclose "evidence favorable to an accused" under *Brady* v. *Maryland*, 363 U.S. 83 (1963), extends to material that does not conclusively disprove the State's allegations but that is inconsistent with the State's proffered motive for the crime.

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—*v.*—

R.C. LEE,
Warden, Central Prison, Raleigh, North Carolina,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Henry Lee Hunt respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit affirming the dismissal of his petition for a writ of habeas corpus.

ORDER AND OPINIONS BELOW

The opinion and Order of the United States District Court for the Eastern District of North Carolina is unreported and is reprinted in the appendix hereto at pages 1a through 40a. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 291 F.3d 284 and is reprinted in the appendix hereto at pages 41a through 60a.

JURISDICTION

The United States District Court for the Eastern District of North Carolina entered judgment in this action on October 16, 2001. On May 23, 2002, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves petitioner's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves petitioner's right to a fair trial under the Due Process Clause of the Fourteenth Amendment. The Due Process Clause provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

In December 1985, petitioner Henry Lee Hunt was convicted in the Superior Court of Robeson County, North Carolina, of two counts of first-degree murder and sentenced to death. On direct appeal, the Supreme Court of North Carolina affirmed the convictions and death sentences. *See State* v. *Hunt*, 373 S.E.2d 400 (N.C. 1988).

This Court then granted petitioner's petition for a writ of certiorari, vacated the death sentences, and remanded the case to the Supreme Court of North Carolina for further consideration in light of *McKoy* v.

North Carolina, 494 U.S. 433 (1990). *See Hunt* v. *North Carolina*, 494 U.S. 1022, 1022 (1990). In *McKoy*, this Court held that North Carolina's requirement of jury unanimity in finding mitigating circumstances in capital cases was unconstitutional. *See McKoy*, 494 U.S. at 444. On remand, the Supreme Court of North Carolina reinstated the death sentences against petitioner, holding that the *McKoy* error in petitioner's case was harmless beyond a reasonable doubt because petitioner's court-appointed counsel had brought no mitigating evidence to the jury's attention during the penalty phase of the trial. *See State* v. *Hunt*, 411 S.E.2d 806, 814 (N.C.), *cert. denied*, 505 U.S. 1226 (1992).

On December 3, 1992, petitioner, assisted by new counsel, filed a Motion for Appropriate Relief ("MAR") in the Superior Court for Robeson County pursuant to N.C. GEN. STAT. § 15A-1411 *et seq.* Petitioner's MAR alleged, among other things, that petitioner received ineffective assistance of counsel in violation of the Sixth Amendment and that the prosecution failed to disclose material exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The Superior Court conducted an evidentiary hearing on petitioner's MAR.

At the MAR hearing, the two law enforcement officers primarily responsible for investigating the murders for which petitioner was convicted admitted that the State possessed information that undermined its theory as to why petitioner allegedly committed those crimes. The State had never disclosed that exculpatory information to petitioner's counsel.

According to the State, Rogers Locklear and Dottie Ransom hired Elwell Barnes and petitioner to kill Jackie Ransom. The State's theory was that petitioner then killed Larry Jones because Jones had, in discussions with the police, identified petitioner as Jackie Ransom's killer. In support of this claim, the State offered the testimony of

Bernice Cummings—petitioner's ex-girlfriend—that she heard petitioner say that "Larry Jones was out running his damn mouth" about the identity of Jackie Ransom's killer and that "he were [*sic*] going to have to put a stop to his damn mouth." The State also presented testimony of law enforcement officers that they had had discussions with Larry Jones about Jackie Ransom's murder, including discussions on the day Jones was killed. The State has never disputed that its theory of the case was that petitioner killed Larry Jones because Jones had fingered him as Jackie Ransom's killer.

In direct contradiction of this theory, both law enforcement officers who interviewed Larry Jones testified at the MAR hearing that Larry Jones never implicated petitioner in Jackie Ransom's death. One officer testified that Larry Jones "was telling us that he would find out . . . who did it. . . . He never said anyone did it. He never gave us a name of who did the murder." The other officer corroborated this testimony, saying: "I don't remember him telling us anything. We just . . . thought maybe he might hear something either on the street or talking to Rogers' family. . . . Just sort of a confidential informant."

Although this evidence was at odds with the State's theory as to petitioner's purported motive for killing Larry Jones, the State neither provided petitioner's counsel with the officers' notes of their discussions with Larry Jones, nor disclosed the simple fact that Larry Jones had never once implicated petitioner in Jackie Ransom's killing. As a result, the State predicated its presentation to the jury as to petitioner's motive on a factual implication that it knew, or should have known, was false.

The suppressed evidence casts doubt not only on petitioner's purported motive for killing Larry Jones, but also on the State's claim that petitioner killed Jackie Ransom. At the time Jackie Ransom was killed, Larry

Jones was spending a significant amount of time at the home of Rogers Locklear, as he was dating Locklear's daughter. Had Rogers Locklear hired petitioner to kill Jackie Ransom, Larry Jones would have been in a position to hear about it from Locklear himself. That Larry Jones never mentioned petitioner to police suggests that petitioner did not kill Ransom.

At the MAR hearing, petitioner also presented evidence concerning the penalty-phase performance of his court-appointed counsel. During the penalty phase of trial, petitioner's counsel failed to present a legal case against his execution and instead relied entirely on moral and religious arguments. Specifically, counsel declined to present any mitigating circumstances, admitted the existence of aggravating circumstances, and presented no argument whatsoever that petitioner's individual circumstances did not warrant execution.

During the closing argument, which is reprinted in the appendix hereto at pages 61a through 73a, counsel made only a single comment that was even arguably specific to petitioner: "Henry Lee Hunt has a family." (63a.) Counsel never expanded on this point, pointed to it as a mitigating circumstance, or otherwise utilized it in making a legal argument on which the jury could rely in deciding that petitioner did not deserve execution.

Rather than argue that under the law the death penalty was unjustified in petitioner's case, counsel argued that as a moral matter the death penalty was unjustified in *any* case. Counsel asserted that the death penalty is "unnatural, unacceptable and barbaric" and that under Biblical precedent the State lacked "the direct and divine authority to take another's life." (71a-72a.) The moral and religious arguments presented by counsel were in no way connected to petitioner's individual circumstances; indeed, they were explicitly divorced from his circumstances. (*See*

67a ("[A]ny punishment that takes the very life of a human being is cruel, immoral and uncivilized, and a throw back to the dark ages.").) Rather than using moral and religious pleas as a *supplement* to legal arguments against imposing the death penalty, petitioner's counsel used those extra-legal pleas as a *substitute* for legal arguments.

Moreover, counsel never argued that the aggravating circumstances in petitioner's case were insufficient to justify execution. Instead, their consistent argument was that although "[c]ertainly, there are aggravating circumstances" in this case, no aggravating circumstances are *ever* sufficient to justify execution. (64a.) In short, counsel's closing argument was a plea for jury nullification, unconnected to the specific circumstances of petitioner's case.

The Superior Court denied petitioner's MAR. On petitioner's *Brady* claim, the court ruled as follows:

> The Court concludes that this is not exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 831 (1963). . . . Cummings testified [petitioner] was angered that Jones was running his mouth about both the Evers larceny and Ransom murder. Jones' failure to name [petitioner] in discussions with investigators is not exculpatory evidence. It does not tend to show [petitioner] was not the killer. Under the facts of this case, the information Jones was providing investigators provided a motive for [petitioner] to murder Jones. Consequently, the evidence is inculpatory.

On petitioner's ineffective assistance of counsel claim, the court examined each aspect of counsel's penalty-phase performance individually without considering the effect of those aspects in the aggregate (which was to present no legal case against execution). Regarding the failure to present mitigating evidence, the court ruled that

despite the ready availability of evidence that would have supported both statutory and nonstatutory mitigating circumstances, counsel's decision to forgo a case in mitigation "was reasonable" and "not deficient" because counsel were "concerned about opening the door" to the presentation of evidence harmful to petitioner. Despite counsel's statement that "[c]ertainly, there are aggravating circumstances in these cases," the court concluded that counsel "did not concede the existence of any aggravating circumstance." Regarding counsel's closing argument, the court ruled that the argument "contain[ed] many conventional arguments often heard in death penalty cases."

Both the North Carolina Supreme Court and this Court denied petitioner's petition for a writ of certiorari. *See State* v. *Hunt*, 485 S.E.2d 304 (N.C. 1997); *Hunt* v. *North Carolina*, 522 U.S. 861 (1997).

On April 10, 1998, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of North Carolina. This petition asserted, *inter alia*, that the Superior Court's decisions on petitioner's claims of ineffective assistance of counsel and of a *Brady* violation were contrary to, or unreasonable applications of, clearly established federal law as determined by this Court. On October 16, 2001, the district court granted respondent's motion for summary judgment and dismissed petitioner's petition in its entirety. (*See* 40a.)

Petitioner appealed the dismissal of his petition to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1291, again raising both the *Brady* claim and the claim of ineffective assistance of counsel at sentencing. The Court of Appeals affirmed the district court's judgment. (*See* 60a.) It ruled that the suppressed evidence concerning Larry Jones' statements to the police

"would only serve to bolster evidence of Hunt's motive" and thus rejected petitioner's *Brady* claim. (60a.) Like the Superior Court, the Court of Appeals concluded that each individual aspect of counsel's penalty-phase performance was reasonable but did not consider the aggregate effect of that performance. (*See* 45a-59a.)

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' Decision That Petitioner Received Effective Assistance of Counsel During the Penalty Phase of Trial Conflicts with Decisions of Other Courts of Appeals.

The Court of Appeals in this case concluded that counsel could make a professionally reasonable sentencing argument without tailoring that argument to petitioner's individual circumstances.[1] (*See* 55a-59a.) That decision diverges from the prevailing rule in other circuits.

In direct conflict with the holding below, the Seventh Circuit has held that counsel's failure to tailor sentencing arguments to the defendant's specific circumstances constitutes professionally unreasonable representation. Indeed, the closing argument in this case was very similar to that presented in *Hall* v. *Washington*, 106 F.3d 742 (7th Cir.), *cert. denied*, 522 U.S. 907 (1997),

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[1] The Court of Appeals noted that counsel "indicated that [petitioner] had a family, that [petitioner] was not perfect, and that the more merciful course would be to spare [petitioner's] life." (57a.) Such observations apply to everyone and cannot be considered specific to petitioner. *See Hall* v. *Washington*, 106 F.3d 742, 747 (7th Cir. 1997) ("boilerplate" facts applicable to most people are not specific to defendant).

which the Seventh Circuit found professionally unreasonable:

- In *Hall*, as here, counsel in closing argument "made no effort to focus on even the meager mitigation evidence that the court had heard." *Id.* at 747. (*Cf.* 57a (petitioner's "counsel concluded that he could not focus on the specific weighing of aggravating and mitigating circumstances").)

- In *Hall*, as here, counsel invited the sentencer "'to focus in on an argument based [] just generally on the theory opposing the death penalty in all cases.'" 106 F.3d at 747 (alteration in original). (*Cf.* 63a, 65a, 67a (arguing that capital punishment is "artificial and . . . unnatural," "totally demoralizing," of "no useful value," "barbarous," and "cruel, immoral and uncivilized").)

- In *Hall*, as here, counsel argued that death penalty sentencing asks the sentencer to make a decision that only God can rightly make. *See* 106 F.3d at 747. (*Cf.* 71a (arguing that the State lacked "the direct and divine authority to take another's life").)

- In *Hall*, as here, counsel argued that the death penalty was inconsistent with the tenets of Christianity. *See* 106 F.3d at 747. (*Cf.* 64a (urging the jury to "search your souls, your morals and your Christian values, . . . whether you are Holiness, Presbyterian, Methodist, Baptist or what ever," to determine whether any aggravating circumstance was ever sufficient to justify capital punishment).)

The Seventh Circuit held that the sentencing presentation in *Hall* "cannot be considered a reasonable strategic choice under *Strickland*," "[g]iven its total lack of focus on [defendant's] individual character and record and

its reliance on irrelevant religious claims." 106 F.3d at 750 (citing *Strickland* v. *Washington*, 466 U.S. 668 (1984)). The Seventh Circuit ruled that in order to give "'consideration [to] the character and record of the individual offender and the circumstances of the particular offense,'" as this Court has required, "counsel must present an argument that focuses the sentencer's attention on those mitigating factors." *Id.* (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976)).

In rejecting the State's claim that a generalized appeal to mercy was sufficient, the Seventh Circuit reasoned:

> A simple plea for mercy may be a valid choice, *if* that plea focuses on the particular defendant and the circumstances of the particular offense. [Counsel's] argument ... contained no such individualized appeal. Rather than asking the judge to decide against the death penalty for legally sufficient reasons—such as particular mitigating factors or the need for mercy in Hall's particular case—[counsel] relied on sweeping and largely irrelevant appeals to the judge's personal beliefs and religious principles. His only mention of Hall's particular history and character was pure boilerplate that could be said of the majority of capital defendants. ... [Counsel] argued against using the death penalty because 'vengeance is not ours to assert.' In essence, [counsel] was asking for the judicial equivalent of jury nullification, asking the judge to ignore the valid law of Illinois and to decide against death on a wholly extralegal basis.

Id. (citations omitted).[2]

The holding in this case is contrary to the holding in *Hall*. Here, the Court of Appeals ruled that a generalized plea for mercy, with only boilerplate references to the defendant, is professionally reasonable. (*See* 55a-59a.) This Court should grant a writ of certiorari to resolve this conflict.

II.

The Court of Appeals' Decision That Counsel's Penalty-Phase Performance Was Not Constitutionally Ineffective Conflicts with Decisions of This Court.

In resolving this conflict among the circuits, this Court should avoid the position taken by the Fourth Circuit. Defense counsel's penalty-phase presentation involved no legal case against imposition of the death penalty and effectively told the jury that under the law it had no choice but to sentence petitioner to death. The Court of Appeals nonetheless held that counsel's decisions—(i) to eschew a case in mitigation, (ii) to admit the existence of aggravating circumstances, and (iii) to premise the entire closing argument on a generalized plea for mercy—were the result of reasonable strategic

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2 In another similar case, *Dobbs* v. *Turpin*, 142 F.3d 1383 (11th Cir. 1998), in which counsel "failed to focus the sentencing jury's attention on the character and record of the individual offender and the circumstances of the particular offense," the Eleventh Circuit concluded that "[t]he failure to focus the jury's attention on these types of particularized circumstances constituted deficient performance." *Id.* at 1389 (internal citations and quotation marks omitted).

decisions.[3] The Court of Appeals did not address petitioner's argument that even if counsel's omissions taken one at a time could be characterized as strategic decisions—implausible though that may be—the cumulative effect of those decisions was to present no legal case against execution.

The Sixth Amendment entitles petitioner to effective assistance of counsel in his defense. *See McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court articulated the two-part test for ineffective assistance of counsel. First, petitioner must show that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. Second, petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

This Court has ruled that sentencing in a capital case "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U.S. at 304. Only then does a defendant's sentence reflect "a reasoned moral response to the defendant's background, character, and crime." *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989). Because "punishment should be directly related to the personal culpability of the defendant," the jury "must be allowed to consider and give effect to mitigating evidence relevant to a defendant's

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[3] In light of counsel's statement that "[c]ertainly, there are aggravating circumstances in these cases," the Court of Appeals rejected the Superior Court's finding that counsel "did not concede the existence of any aggravating circumstance." (57a.)

character or record or the circumstances of the offense." *Id.* at 327.

Rather than presenting mitigating evidence or arguing on the basis of petitioner's individual circumstances, petitioner's counsel presented only abstract moral and religious platitudes. Although the Superior Court stated that counsel's closing argument "contain[ed] many conventional arguments often heard in death penalty cases," petitioner never argued that it is impermissible for counsel to raise general moral and religious themes. Petitioner instead argued that it is impermissible to rely *solely* on those arguments. To do so is to decline to present any legal argument cognizable in the state's sentencing scheme.

North Carolina law specifies the factors that can be considered aggravating and mitigating. *See* N.C. GEN. STAT. § 15A-2000(e)-(f). Consistent with this Court's jurisprudence, these relevant circumstances relate solely to the facts and circumstances of the individual defendant's case. *See State* v. *Hutchins*, 279 S.E.2d 788, 806 (N.C. 1981). Even North Carolina's "catch-all" mitigating circumstance allows the jury to consider only "[a]ny other circumstance *arising from the evidence* which the jury deems to have mitigating value." N.C. GEN. STAT. § 15A-2000(f)(9) (emphasis added). Thus, the *only* circumstances a juror may consider in deciding whether a sentence of death is warranted under North Carolina law are those in evidence that are specific to the defendant and crime at issue. *See Hutchins*, 279 S.E.2d at 806.

In rejecting petitioner's claim, the Court of Appeals offered the novel theory—asserted by neither the State nor the other courts that have considered petitioner's claim—that North Carolina law provides juries discretion to consider general moral and religious arguments in capital sentencing. (*See* 58a (citing N.C. GEN. STAT. § 15A-

2000(b)(3); *State* v. *Conner*, 480 S.E.2d 626, 632 (N.C. 1997)).) This argument is doubly flawed.

First, North Carolina law is clearly to the contrary. North Carolina's capital sentencing scheme requires the jury to make three determinations: whether aggravating circumstances exist; whether mitigating circumstances exist that outweigh the aggravating circumstances; and "[b]ased on these considerations, whether the defendant should be sentenced to death." N.C. GEN. STAT. § 15A-2000(b). The Court of Appeals claimed that the third determination allows consideration of mercy or sympathy driven by moral and religious arguments not specific to the defendant. (*See* 58a.) But section 15A-2000(b)(3) limits the jury to a determination "[b]ased on these considerations"—"these considerations" being the previous two sentencing determinations, both of which are specific to the defendant and the crime. *State* v. *Conner*, 480 S.E.2d 626 (N.C. 1997), on which the Court of Appeals relied, in fact held that sympathy could only be a factor in the jury's determination when it arose from the evidence and was specific to the defendant's circumstances. *Id.* at 632 (citing N.C. GEN. STAT. § 15A-2000(f)(9)).

Indeed, under North Carolina law, it is improper for counsel to suggest that jurors should base their sentencing determination on anything other than the mitigating and aggravating circumstances introduced into evidence. *State* v. *Robinson*, 451 S.E.2d 196, 207-08 (N.C. 1994), *cert. denied*, 515 U.S. 1135 (1995). Moral and religious arguments unrelated to the individual defendant are "irrelevant and of no probative value" because they are "in no way connected to defendant, his character, his record or other circumstances of the charged offense." *State* v. *Cherry*, 257 S.E.2d 551, 559 (N.C. 1979).

Second, if North Carolina law did allow juries to factor into their deliberations general notions of morality

and religious duty unrelated to defendants or their crimes, then that law arguably would be unconstitutional. This Court has held that "in order to minimize the risk that the death penalty would be imposed capriciously on a selected group of offenders, the decision to impose it [has] to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." *Gregg* v. *Georgia*, 428 U.S. 153, 199 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.). A jury's exercise of mercy avoids "constitutional infirmity" only where it is "mercy based on the mitigating evidence introduced by the defendant." *Id.* at 197-99.

In this case, counsel's appeals to moral and religious themes were in no way specific to petitioner and were therefore irrelevant under North Carolina law. Petitioner does not dispute that counsel's argument featured many "conventional arguments" that are staples of death penalty closing arguments, but what counsel's closing argument omitted was the conventional argument *required* in death penalty cases: that the defendant's specific circumstances do not justify execution. In omitting that argument entirely, Counsel's performance fell outside the bounds of "professionally competent assistance."

Had counsel presented a case in mitigation specific to petitioner, petitioner would have been entitled to a new sentencing hearing under the more favorable—and constitutional—standard articulated by this Court in *McKoy*. There is no dispute in this case that petitioner could present at such a hearing substantial evidence to support statutory and nonstatutory mitigating circumstances under North Carolina law. In only three circumstances has *McKoy* error been deemed harmless beyond a reasonable doubt: (i) where the jurors unanimously rejected all submitted mitigating circumstances, *see State* v. *Laws*, 402 S.E.2d 573, 576-77 (N.C.), *cert. denied*, 502 U.S. 876

(1991); (ii) where the jury recommended death despite finding all submitted mitigating circumstances, *see State* v. *Roper*, 402 S.E.2d 600 (N.C.), *cert. denied*, 502 U.S. 902 (1991); and (iii) here, where counsel offered no case in mitigation, *see State* v. *Hunt*, 411 S.E.2d 806, 814 (N.C. 1992). In every case in which mitigating circumstances were offered and jury unanimity was uncertain—including the case of petitioner's co-defendant, Elwell Barnes—the North Carolina Supreme Court remanded for a new sentencing hearing.[4] Petitioner was clearly prejudiced by his counsel's deficient performance. This Court should grant a writ of certiorari to prevent this manifest violation of petitioner's constitutional rights and to correct this erroneous construction of the law.

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[4] *See State* v. *Zuniga*, 444 S.E.2d 443 (N.C. 1994); *State* v. *Adams*, 439 S.E.2d 760 (N.C. 1994); *State* v. *Heatwole*, 423 S.E.2d 735 (N.C. 1992); *State* v. *Cummings*, 422 S.E.2d 692 (N.C. 1992); *State* v. *Upchurch*, 421 S.E.2d 577 (N.C. 1992); *State* v. *Willis*, 420 S.E.2d 158 (N.C. 1992); *State* v. *Boyd*, 418 S.E.2d 471 (N.C. 1992); *State* v. *Johnson*, 417 S.E.2d 483 (N.C. 1992); *State* v. *Simpson*, 415 S.E.2d 351 (N.C. 1992); *State* v. *Meyer*, 412 S.E.2d 339 (N.C. 1992); *State* v. *Barnes*, 408 S.E.2d 843 (N.C. 1991); *State* v. *Hedgepeth*, 409 S.E.2d 309 (N.C. 1991); *State* v. *McLaughlin*, 408 S.E.2d 732 (N.C. 1991); *State* v. *Robinson*, 409 S.E.2d 288 (N.C. 1991); *State* v. *Turner*, 410 S.E.2d 847 (N.C. 1991).

III.

In Holding That the Suppressed Evidence Need Not Be Disclosed, the Court of Appeals Utilized an Overly Narrow Standard for Determining When Evidence Is Favorable to an Accused, in Conflict with Decisions of This Court.

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), this Court held that the State's failure to disclose "evidence favorable to an accused" violates the Due Process Clause "where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *Id.* at 87. The State's duty to disclose evidence favorable to a defendant applies whether or not the defendant specifically requests such evidence. *See United States* v. *Bagley*, 473 U.S. 667, 682 (1985); *United States* v. *Agurs*, 427 U.S. 97, 106-07 (1976).

In this case, the Superior Court rejected petitioner's *Brady* claim on the ground that Jones' failure to name petitioner in discussions with the police "does not tend to show that [petitioner] was not the killer." In affirming the dismissal of petitioner's habeas petition, the Court of Appeals essentially held that the State has a duty under *Brady* to disclose only evidence that disproves the charges against a defendant.

Only by adopting an overly narrow construction of "evidence favorable to an accused"—and thus creating a conflict with this Court's decisions construing *Brady*—could the Court of Appeals conclude that the State was not required to disclose evidence demonstrating that Larry Jones did not implicate petitioner in Jackie Ransom's killing. The Court of Appeals held that the evidence at issue "would only serve to bolster evidence of [petitioner's] motive" because it would confirm that Jones was having discussions with the police. Petitioner's *Brady*

claim, however, focused not on the existence of discussions between Jones and the police but on what Jones said to the police. At trial, the State introduced evidence that Jones was talking to the police. The State plainly wished the jury to believe that Jones named petitioner as Jackie Ransom's murderer in those discussions. Evidence that Jones had not named petitioner as Jackie Ransom's killer—in fact, that he had expressed ignorance as to the killer's identity—clearly would have been exculpatory, limiting the extent to which Jones' discussions with the police could be viewed as inculpatory and undermining the State's theory as to petitioner's motive.

In other words, the Court of Appeals held that because the *existence* of discussions between Jones and the police was consistent with the State's theory, the State was under no obligation to disclose evidence regarding the *content* of those discussions, even though that evidence was itself exculpatory and limited the extent to which the discussions were inculpatory. This is inconsistent with *Brady* and its progeny: The fact that an item of evidence does not conclusively disprove the State's allegations, but rather renders other evidence less likely to be inculpatory, does not insulate that item from disclosure.

This Court has also made clear that "[i]mpeachment evidence . . . , as well as exculpatory evidence, falls within the *Brady* rule." *Bagley*, 473 U.S. at 676. The Court of Appeals ignored this settled principle of law. Only by doing so could the Court of Appeals rule that the State was not required to produce the officers' notes of their discussions with Jones. The plain implication of Bernice Cummings' testimony was that Jones had told the police that petitioner killed Jackie Ransom. Thus, notes of discussions with the police rebutting that implication would have been useful impeachment evidence. The Court of Appeals simply ignored this claim.

Because the Court of Appeals concluded that the suppressed evidence was not favorable to petitioner, it never addressed the materiality of that evidence. Where undisclosed evidence demonstrates that the State introduced testimony that it knew, or should have known, was false, the State is held to "a strict standard of materiality." *Agurs*, 427 U.S. at 104. Under that strict standard, the verdict "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* In this case, the evidence in question was inconsistent with the inferences that the State sought to create through Bernice Cummings' testimony and suggests that the State, in offering testimony from law enforcement officers about their close work with Larry Jones, urged the jury to draw inferences that the State knew to be false. The State therefore should be held to a strict standard of materiality. In any event, the verdict against petitioner must be set aside "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

The suppressed evidence here was material under either standard. Holding the State to "a strict standard of materiality," there was a "reasonable likelihood that the false testimony could have affected the judgment of the jury": Bernice Cummings' testimony—and the false implications the State encouraged the jury to draw from it and from the police officers' testimony regarding their discussions with Larry Jones—provided the jury with the only plausible motive for why petitioner would have killed Larry Jones. *Agurs*, 427 U.S. at 103.

Even if the State did not knowingly use false testimony, there is a "reasonable probability" that the result of the trial would have been different had the suppressed evidence been disclosed. In assessing whether such a

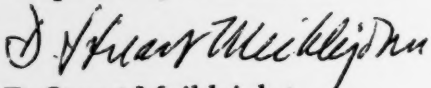
reasonable probability exists, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995). Thus, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough room to convict." *Id.* at 434-35. Had the suppressed evidence been disclosed, the proffered motive for petitioner to have killed Larry Jones would have been undermined, and Bernice Cummings' credibility on an issue central to the State's case would have been thrown into doubt. "[F]airness cannot be stretched to the point of calling this a fair trial." *Id.* at 454 (internal quotation marks omitted).

In short, as a result of the State's failure to disclose exculpatory evidence in violation of its constitutional obligations under *Brady*, petitioner did not receive a fair trial. The State's only proffered motive for petitioner to kill Larry Jones—and a recurrent theme in the State's trial presentation—was that Jones was eliminated as a prospective witness against petitioner because he was telling the police that petitioner killed Jackie Ransom. The State's failure to disclose evidence that casts doubt on that theory undermines confidence in the outcome of the entire trial.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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August 21, 2002

Appendix

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:97-HC-873-BO

HENRY LEE HUNT,)
Petitioner,)
v.)
)
R.C. LEE,[1] Warden, Central) ORDER
Prison Raleigh, North Carolina,)
Respondent.)
)
)

This matter is before the Court on Henry Lee Hunt's ("Hunt") Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Respondent has filed an Answer and Motion for Summary Judgment. Petitioner has not filed a response in opposition to the Motion for Summary Judgment, and the time for doing so has expired. For the reasons discussed below, Respondent's Motion for Summary Judgment will be GRANTED and Hunt's petition will be DISMISSED.

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1 James B. French, former Warden of Central Prison, was named as Respondent in the petition. Since the petition was filed, R.C. Lee has replaced James B. French as Warden.

STATEMENT OF THE CASE

I. Background Facts

On May 23, 1985, Hunt was arrested and charged with two counts of murder and two counts of conspiracy to commit murder arising from the 1984 murders of Jackie Ransom ("Ransom") and Larry Jones ("Jones"). Elwell Barnes was similarly charged. A.R. Barnes was charged with murder and conspiracy to commit murder arising from the murder of Ransom. Hunt, Elwell Barnes and A.R. Barnes were tried together at the November 18, 1985 Special Criminal Session of Robeson County Superior Court.

The North Carolina Supreme Court, in its decision on Hunt's direct appeal, gave the following description of the underlying facts:

> Dottie Locklear Ransom had first married Rogers Locklear. Locklear was a construction worker and often worked out of town for several days at a time. Dottie began seeing Jackie Ransom while Locklear was out of town. She eventually married him, although she never divorced Locklear. Ransom began living with her while Locklear was out of town, and would leave the house when it was time for Locklear to return.
>
> In July 1984, Dottie asked Locklear about the possibility of insuring Ransom's life and then having him killed. She wanted to buy a trailer and a café. On 3 August 1984 she purchased a $25,000 life insurance policy. She asked the agent whether, if Ransom were killed in a fight, she would be entitled to double indemnity for accidental death.

Dottie asked Locklear to find a hit man to kill Ransom. Locklear asked his brother Harry to run over Ransom with his car. Harry refused, but told Locklear that if he wanted a hit man he should see A.R. Barnes.

On 16 August, Locklear met A.R. Barnes and gave him a ride to Locklear's house. After some negotiation Rogers and Dottie Locklear agreed to pay A.R. Barnes $2,000 to kill Jackie Ransom. A.R. Barnes said "If I don't kill him, I'll get it done."

Locklear and A.R. Barnes met several times after that. On 8 September, Locklear went to A.R.'s house to see if he was going to kill Ransom, and to tell him the insurance policy had been received. Locklear did not see A.R., but saw his brother, the defendant Elwell "Babe" Barnes. Elwell Barnes asked Locklear if he could take his brother's place, and kill Ransom for the same compensation Locklear had promised his brother. Locklear replied that it was up to him.

Elwell Barnes then told Locklear to drive him to the home of the defendant Henry Lee "Mulehead" "Buck" Hunt. When they arrived at Hunt's trailer, Barnes talked with Hunt privately for about 10 minutes. Later, Hunt got into the car, put his hand on his pocket and told Locklear "I got the gun. Me and Babe can get the job done." Barnes replied "Yeah." They drove past a house and Hunt looked at it and said "That looks like where Jackie stay, there." They then drove down a road into some woods and Hunt put the gun in some bushes. They then drove back into town, and Locklear pointed out Jackie Ransom. Hunt

told Locklear to get his wife and take her to a place at which there would be witnesses.

At about 11:00 or 11:30 that night the defendants Hunt and Elwell Barnes returned to Hunt's trailer. Hunt took off his clothes and put them in the washing machine, and put a pistol under his mattress. Barnes spent the night on the couch. The next morning Bernice Cummings, who lived with Hunt at his trailer, asked Barnes where they had been the night before. Barnes replied that they had killed Jackie Ransom for $2,000, for Dottie and Rogers Locklear. Bernice asked who shot Ransom and Barnes replied "Henry Lee Hunt."

Later that day Locklear drove to Hunt's trailer. Hunt walked up to him and said "I killed Jackie last night." He said he wanted his money in 30 days or he would kill Dottie and Locklear. Later that day, Ransom's body was found in a shallow grave. An autopsy revealed that Ransom died from a gunshot wound to the head.

The next day, 10 September, the defendants were at Hunt's trailer. Buddy Roe Barton drove up. Hunt went to Barton's car and returned after a few minutes, and stated that Larry Jones was running his mouth, and that he "would put a stop to his damn mouth."

Larry Jones lived with Hunt's sister, [Aggie Nora.[2]] He met several times with Detective Mike

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2 The North Carolina Supreme Court used the name "Aganora". Both Hunt and Respondent have acknowledged that the references to "Aganora" in the trial transcript reflect references to Aggie Nora, Hunt's sister.

Stogner of the Lumberton Police Department and SBI Agent Lee Sampson and talked about Ransom's death.

On 14 September, Hunt told Bernice Cummings that he was going to "kill that water-headed, ratting son-of-a-bitch Larry Jones" and wanted to get a shovel so he would "bury him where he never could be found." He stated that Jones had been running his mouth and that he knew that Hunt had killed Ransom. Hunt procured a shovel from Mitt Jones and put it in his trunk. Later, Hunt got a shotgun and put it in the trunk of Bernice's car. Hunt said to [Aggie Nora] and Bernice that he was going to kill Larry Jones because Jones knew he killed Jackie Ransom, and could get him a life sentence.

Later that day Hunt and Elwell Barnes were riding in an automobile driven by Jerome Ratley when they picked up Jones. They went to the home of a person called "String Bean." They left that place and continued driving. Hunt told Ratley to turn off onto a dirt road, then onto a tram road. Then Hunt told Ratley to stop and turn off the lights. Hunt then turned around and shot Jones in the chest. Ratley saw two or three shots. Hunt said "You don't eat no more cheese for no damn body else. I'll meet you in heaven or hell, one." Hunt then pulled Jones out of the car, and Barnes got the shotgun from the trunk. Jones started mumbling "Mule, Mule." Barnes pointed the shotgun at Jones' head. Hunt said "Don't shoot him with the shotgun," and shot him with the pistol several times. Barnes kept a lookout while Hunt and Ratley dragged Jones' body into the woods about a hundred yards and buried him

> in a shallow grave. As they rode back into town, Barnes said "That man was about to cause me to pull a life sentence."
>
> The next morning, 16 September, Hunt told Bernice Cummings that he had carried Larry Jones to where he would never be found.
>
> On 1 October, Jones' body was found. An autopsy revealed that he died of a gunshot wound to the head. A ballistics expert testified that bullets removed from the body were fired from the .25 caliber Beretta that Hunt had given his son-in-law after the murders. While in jail, Hunt told his son-in-law he had killed Ransom and Jones. He also told him to get rid of the gun, and to get his brother to "get rid of the black guy", meaning Jerome Ratley, because "He's the one that can hurt me most."

State v. Hunt, 323 N.C. 407, 410-15, 373 S.E.2d 400, 403-06 (1988)("*Hunt I*")(footnote added).

A mistrial was declared as to A.R. Barnes. *Id.* at 414, 373 S.E.2d at 406. The jury returned verdicts of guilty on all counts as to Elwell Barnes and Hunt. A sentencing proceeding then commenced, at which Hunt did not put on any evidence in mitigation. At the conclusion of the sentencing hearing, the jury recommended that Hunt and Elwell Barnes be sentenced to death for each murder charge. The trial court imposed death sentences accordingly and sentences of ten years' imprisonment for each conspiracy charge.

II. Post-Conviction History

On direct appeal, the North Carolina Supreme Court found no error in either the guilt phase or the sentencing phase of Hunt's trial and affirmed his

convictions and sentences. *Hunt I*, 323 N.C. at 438, 373 S.E.2d at 419. The United States Supreme Court vacated the judgments and remanded to the North Carolina Supreme Court for reconsideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227 (1990).[3] *See Hunt v. North Carolina*, 494 U.S. 1022, 110 S. Ct. 1464 (1990). On remand, the North Carolina Supreme Court found that the unanimity instruction in this case was harmless beyond a reasonable doubt because Hunt had not presented any evidence in mitigation. *See State v. Hunt*, 330 N.C. 501, 411 S.E.2d 806 (*"Hunt II"*), *cert. denied*, 505 U.S. 1226, 112 S. Ct. 3045 (1992).

Hunt filed a motion for appropriate relief (MAR) in Robeson County Superior Court on December 3, 1992. The state court entered an order on June 2, 1994, dismissing several of Hunt's claims on the grounds of procedural bar. Hunt sought, but was denied, a writ of certiorari in the North Carolina Supreme [Court]. *State v. Hunt*, 336 N.C. 783, 447 S.E.2d 436 (1994).

The state court then conducted an evidentiary hearing on the remaining claims. The hearing began on September 12, 1994, and lasted approximately five weeks. During the hearing, the state court received evidence and heard testimony from at least 27 witnesses. The evidence presented at the MAR hearing showed, among other things, the following: Hunt was first incarcerated in 1964. Order Denying Motion for Appropriate Relief ("MAR Order") at 65. Hunt spent a significant portion of the years between 1964 and 1985 in prison. *Id.* at 66. While incarcerated, Hunt had several infractions, including assaults and other acts of violence, and his prison records

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[3] In *McKoy*, the Supreme Court held that North Carolina's capital jury instruction requiring unanimity in finding mitigating circumstances was unconstitutional.

revealed an incident where Hunt stabbed a fellow inmate in the lower abdomen, causing serious injury. *Id.* at 43, 46 & 87. At the time of Hunt's trial, the State had information that was provided to Hunt's trial counsel through discovery that linked Hunt to at least two other Robeson County murders. *Id.* at 41, 100. Hunt's trial counsel knew that the prosecutor intended to use that evidence in rebuttal if Hunt took the stand. *Id.* at 47, 52. Hunt also had dynamited his mother's residence after she left the family for another man, although there were no resulting personal injuries. *Id.* at 41.

By written order dated September 16, 1996, the state court made numerous findings of fact and denied the remaining claims in Hunt's MAR. Hunt sought review of the MAR Order by filing a petition for writ of certiorari in the North Carolina Supreme Court. The North Carolina Supreme Court denied review on April 10, 1997. *State v. Hunt*, 345 N.C. 758, 485 S.E.2d 304 (1997). Hunt's petition for writ of certiorari to the United States Supreme Court was denied on October 6, 1997. *Hunt v. North Carolina*, 522 U.S. 861, 118 S. Ct. 163 (1997).

Hunt's petition for writ of habeas corpus was filed in this Court on April 10, 1998. On May 22, 1998, Hunt filed a motion for leave to conduct discovery. Respondent answered the petition and filed a motion for summary judgment on July 2, 1998. Hunt did not file a response to Respondent's motion for summary judgment. Hunt's motion for leave to conduct discovery was denied by Order filed on August 5, 1998.

DISCUSSION

I. Standard of Review under AEDPA

This Court's review of Hunt's claims is governed by 28 U.S.C. § 2254(d). This section provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(2000).

A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 1523 (2000). A state court decision involves an "unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* "[A] federal habeas court may not issue the writ simply because that court

concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411, 120 S. Ct. at 1522.

Only after a petitioner establishes that the state court's adjudication of his claims was "contrary to" or an "unreasonable application of" clearly established federal law or based on an unreasonable determination of the facts may a federal court proceed to review a state court judgment independently to determine whether habeas relief is warranted. *Rose v. Lee*, 252 F.3d 676 (4th Cir. 2001). Similarly, if a petitioner properly presented a claim to the state court, but the state court did not adjudicate the claim on the merits, the federal court must review *de novo* questions of law and mixed questions of law and fact. *Fisher v. Lee*, 215 F.3d 438, 445 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 822 (2001).

Finally, in reviewing a petitioner's claims, a federal court must presume that the factual findings of the state court are correct. 28 U.S.C. § 2254(e)(l)(2000). The petitioner bears the burden of rebutting this presumption of correctness by clear and convincing evidence. *Id.*

II. Analysis of Hunt's Claims

In his petition, Hunt presents four claims. In Claims I and II, Hunt contends that he received ineffective assistance of counsel during the guilt phase and the sentencing phase, respectively, of his trial. In Claim III, Hunt alleges that the State failed to disclose material exculpatory evidence in violation of the principles enunciated in *Brady v. Maryland*. In Claim IV, Hunt asserts numerous claims of trial-related constitutional error, most of which the state court found were procedurally barred.

A. Claim I—Ineffective Assistance of Counsel During Guilt Phase

Hunt alleges he received constitutionally ineffective assistance of counsel during the guilt phase of his trial in three respects: first, in counsel's failure to conduct an adequate investigation and to interview key witnesses; second, in counsel's failure to effectively address the State's physical evidence presented at trial; and, third, in counsel's failure to expose inconsistencies in the State's evidence. Hunt argues that, as a result of counsel's ineffectiveness, the jury did not have an opportunity to hear and consider all of the evidence in the case — evidence that he contends would have created a reasonable doubt in the mind of at least one juror whether he was responsible for the deaths of Ransom and Jones.

Hunt raised this claim in his MAR and it was adjudicated on the merits by the state court. Therefore, Hunt must demonstrate that the state court's adjudication of this claim was contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d).

"It is past question that the rule set forth in *Strickland [v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)] qualifies as 'clearly established Federal law, as determined by the Supreme Court.'" *Williams*, 529 U.S. at 391, 120 S. Ct. at 1512. In *Strickland*, the Supreme Court set forth a two-part test for determining whether counsel's performance was constitutionally adequate and effective: (1) did counsel's representation fall below an objective standard of reasonableness? If so, (2) did counsel's deficient performance result in prejudice to the defense? *Strickland*, 466 U.S. at 687-88, 692-93, 104 S. Ct. at 2064, 2067. The reasonableness of counsel's performance must

be judged on the specific facts of the case, viewed as of the time of counsel's conduct. *Id.* at 690, 104 S. Ct. at 2066. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S. Ct. at 2065. To establish prejudice, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068.

1. Counsel's failure to conduct an adequate investigation and to interview key witnesses.

Hunt contends that trial counsel were ineffective because they failed to interview key witnesses, including both witnesses who testified for the State and those who could have testified for the defense. In his petition, Hunt lists numerous persons whom he contends counsel should have interviewed either to prepare for cross-examination or to obtain evidence favorable to the defense: Theodora Freeman, Hunt's daughter; Annie Ruth Hunt, Hunt's sister; Aggie Nora Hunt, Hunt's sister; Wilbert Hunt, Hunt's brother; Minnie Locklear, Rogers Locklear's daughter; Harvey Oxendine, a friend of Hunt's and a potential alibi witness; Dr. Butts, the medical examiner present during the autopsy of Jones; Dr. Thompson, the medical examiner who performed the autopsy on Ransom; Jerome Ratley, who testified as an eyewitness to the murder of Jones; Bernice Cummings, Hunt's girlfriend at the time of the murders; and Alvin Fields, a friend of Hunt's and potential alibi witness.

Each of these persons testified at the MAR hearing. At the conclusion of the lengthy hearing, the state court considered their testimony, assessed the credibility of the witnesses, and weighed all of the evidence before that court. *See, e.g.*, MAR Order at 1, 93. The state court found that the testimony of some of these witnesses essentially corroborated their own trial testimony, or the testimony of

others. *See, e.g., id.* at 82 (testimony of Annie Ruth Hunt corroborated the trial testimony of Bernice Cummings and Jim Delton Freeman); *id.* at 27-30 (Dr. Butts' MAR testimony did not impeach Jerome Ratley's trial testimony); *id* at 89-90 (testimony of Jerome Ratley was consistent with his trial testimony); *id.* at 56,91 (Bernice Cummings was vigorously cross-examined by Hunt's trial counsel and, to the best of her knowledge and ability, she testified truthfully at Hunt's trial). For others, the state court found that their testimony was contradicted and rebutted by other evidence offered by Hunt. *See, e.g., id.* at 83 (testimony of Aggie Nora Hunt). Still for others, the state court found that their testimony simply lacked credibility. *See, e.g., id.* at 81 (Wilbert Hunt); *id.* at 85-86, 94 (Harvey Oxendine); *id.* at 24, 94 (Alvin Fields). And, finally, for some the state court considered their testimony but, nonetheless, found it insufficient to establish that counsel's performance was deficient and that Hunt suffered prejudice. *See, e.g., id.* at 88-89 (testimony of Theodora Freeman); *id.* at 83, 90-91 (testimony of Minnie Locklear); *id.* at 76 (testimony of Dr. Thompson).

The state court also heard and considered the testimony of Hunt's trial counsel. *See, e.g., id.* at 21-27, 31, 33-41, 43-56. The state court found that Hunt's trial counsel extensively cross-examined the State's witnesses and that the allegedly impeaching information brought forward at the MAR hearing was merely cumulative of information brought out at trial. *Id.* at 56. The state court further found that

> [t]rial counsel made considerable efforts to interview critical State's witnesses. Their task in representing Hunt was made much more difficult due to witness intimidation initiated by Hunt. While they did not attempt to interview every potential witness, Hunt has failed to prove their

> performance was deficient. Clearly, Hunt has failed to show prejudice.... Hunt has failed to prove his trial attorneys were deficient or he was prejudiced by the manner in which the attorneys prepared witnesses or prepared for cross-examination.

Id. at 94.

Hunt argues that the state court both unreasonably applied *Strickland* and based its decision on an unreasonable determination of facts in light of the evidence presented. *See* Pet. for Writ of Hab. Corpus at 44. However, Hunt has failed to refute by clear and convincing evidence the state court's factual findings. Moreover, Hunt has not shown that the state court's factual findings are in any way unreasonable in light of the evidence presented, or that the state court unreasonably applied *Strickland* to those facts. This Court has reviewed the evidence presented at the MAR hearing, the evidence presented at trial and the MAR Order as well as the arguments raised by Hunt in his petition and finds that the state court's factual findings are amply supported by the record. In the absence of clear and convincing evidence to the contrary, those factual findings are presumed correct. Thus, as to this claim, Hunt has failed to meet his burden under 28 U.S.C. § 2254(d).

2. Counsel's Failure to Effectively Deal with the State's Evidence

Hunt contends that his trial counsel provided ineffective assistance because they failed to deal effectively with physical evidence offered by the State, specifically evidence concerning blood stains inside the car in which Jones was killed and the shovels used to bury Jones. Hunt argues that his counsel failed to develop strategies for countering this evidence to minimize its impact on the jury

and that his counsel should have filed motions in limine to exclude this evidence. In adjudicating this claim, the state court found that "motions in limine regarding the State's blood evidence and shovels . . . would not have been successful. The evidence related to blood in the Plymouth Valiant and shovels was relevant to corroborate witness testimony." MAR Order at 93.

Hunt has failed to establish that the state court's findings and conclusions in this regard are unreasonable in light of the evidence presented. Moreover, Hunt has failed to show that the state court's determination that counsel's performance in handling the physical evidence at trial was not deficient was contrary to, or involved an unreasonable application of, clearly established federal law. Thus, Hunt has failed to meet his burden under 28 U.S.C. § 2254(d) as to this claim.

3. Counsel's Failure to Expose Inconsistencies in the State's Evidence

Hunt contends that his counsel should have emphasized facts that pointed to A.R. Barnes as the likely killer of Ransom and Rogers Locklear as the likely killer of Jones. In support of this claim, Hunt relies upon the fact that Dottie Ransom identified A.R. Barnes as the person who had agreed to kill Ransom and denied having any knowledge of the agreement to have Hunt and Elwell Barnes kill Ransom and, further, the fact that after Ransom's murder, A.R. Barnes told Rogers Locklear during a phone conversation that he was "going to have to have some money, I can't take this on myself." Hunt also points to a letter written by Rogers Locklear to Dottie Ransom months after Ransom's murder in which Locklear urges Dottie to tell the police that it was someone else who agreed to pay A.R. Barnes to murder Ransom, which letter makes no mention of Hunt or Elwell Barnes. As for the murder of Jones, Hunt argues that counsel failed to

emphasize evidence that points to Rogers Locklear as the likely killer of Larry Jones and that Minnie Locklear, Rogers Locklear's daughter who was 17 years old at the time of the murders, would have told counsel that Larry Jones was at her house at the time he allegedly was murdered by Hunt.

As noted above, the state court found that Hunt's trial counsel extensively cross-examined the State's witnesses and that all of the allegedly impeaching information brought forward at the MAR hearing was merely cumulative. MAR Order at 56. The state court also found that the cross-examination of State's witnesses by Hunt's counsel was entirely competent and brought considerable impeaching information to the attention of the jury. *Id.* at 93. Hunt has failed to establish that the state court's adjudication of this claim is contrary to, or involves an unreasonable application of, clearly established federal law. Nor has Hunt shown that the state court's adjudication is based upon an unreasonable determination of the facts in light of the evidence presented. Thus, Hunt has not met his burden under 28 U.S.C. § 2254(d) as to this claim.

Accordingly, because Hunt has failed to establish that the state court's adjudication of his claim of ineffective assistance of counsel during the guilt phase is contrary to, or involves an unreasonable application of, clearly established federal law, or is based upon an unreasonable determination of the facts in light of the evidence, Hunt is not entitled to relief under 28 U.S.C. § 2254(d). Therefore, as to Claim I of the petition, Respondent's motion for summary judgment is hereby GRANTED.

B. Claim II — Ineffective Assistance of Counsel at the Sentencing Phase

In his second claim for relief, Hunt alleges that he received ineffective assistance of counsel during the sentencing phase. Hunt complains, first, that his counsel failed to investigate, develop and present any mitigating evidence and, second, that counsel's closing argument at the sentencing phase was ineffective. Hunt raised this claim in his MAR and the state court adjudicated this claim on the merits. *See* MAR Order at 95-100. Thus, Hunt must establish that the state court's adjudication of this claim was contrary to, or an unreasonable application of, clearly established federal law or was based upon an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d).

1. Counsel's Failure to Present Mitigating Evidence.

In adjudicating this claim, the state court first noted that "an attorney representing a capital defendant has a duty to make a reasonable investigation into potential mitigating evidence or a reasonable decision which makes a particular investigation unnecessary." MAR Order at 95. The state court also plainly identified the applicable legal standard under *Strickland*:

> strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations of investigation. In other words, counsel has a duty to make reasonable investigations or a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assess[ed] for reasonableness in all circumstances, applying a

> heavy measure of deference to counsel's judgments.

Id. (quoting *Strickland*, 466 U.S. at 691).

After considering the evidence presented at the MAR hearing, the state court found that counsel's investigation of Hunt's social history "was clearly reasonable and sufficiently complete to support his strategic decision to not present social history evidence at the sentencing phase." *Id.* at 95-96. Moreover, concerning counsel's failure to engage a psychiatrist to evaluate Hunt and assist in the presentation of mitigating factors, the state court found that "[c]onsidering all the circumstances . . . , the decision to not utilize a psychiatrist at penalty phase was reasonable." *Id.* at 97. In evaluating the reasonableness of counsel's decision to not put on any evidence in mitigation, the state court also considered the fact that Hunt's "prison record was significant and details of assaults Hunt committed in prison would have been harmful at sentencing." *Id.* at 41. The state court summarized its findings as to this claim as follows:

> [Counsel's] decision to not present evidence at penalty phase was reasonable. Hunt had rejected utilizing a psychiatrist. Neither Hunt nor his family members wanted to testify. Hunt's criminal record was significant and the details of the offenses had not come out. [Counsel] were confronted with putting on reluctant family members many of whom were linked to attempts to destroy evidence and intimidate witnesses. These problems were caused by Hunt. Moreover, Hunt's record contained prior bad acts which were not the subjects of convictions and the attorneys knew from discovery the State was going to try and link Hunt to other murders. They were concerned about opening the door.

> [Counsel's] performance at sentencing phase was not deficient. Any arguable errors did not prejudice Hunt.

Id. at 100.

Hunt argues that the state court's findings are not supported by the evidence presented at the MAR hearing. However, based upon this Court's review of the record of the MAR hearing and the MAR Order, the Court cannot conclude that the state court's factual findings are unreasonable. There was much conflicting evidence presented at the MAR hearing on disputed issues, such as whether members of Hunt's family would have testified at trial, whether Hunt would have allowed counsel to put on evidence of his family background, and whether Hunt refused to be examined by a psychiatrist. The state court had the opportunity to observe the witnesses, assess their credibility and then weigh the evidence before it. That is precisely what the state court did in making its findings of fact. *See id.* at 1. There was ample evidence presented at the MAR hearing to support the state court's findings of fact. Nor has Hunt shown that the state court unreasonably applied the applicable legal standard under *Strickland* to those facts.

Hunt also argues that the state court erred because it did not consider as prejudice the impact of counsel's failure to put on any mitigating evidence when his case was remanded to the North Carolina Supreme Court for reconsideration in light of *McKoy*. Hunt suggests that, had any mitigating evidence been submitted, the North Carolina Supreme Court would have vacated his sentence and ordered a new sentencing hearing. Instead, the North Carolina Supreme Court found that the *McKoy* error was harmless beyond a reasonable doubt because "there is little or no mitigating evidence offered or arising from the evidence presented." *Hunt II*, 330 N.C. at 516-17, 411 S.E.2d

at 814. Hunt contends that this alone establishes prejudice under *Strickland*.

As noted above, the state court specifically found that Hunt had failed to establish the first prong of *Strickland* — that counsel's performance fell below an objective standard of reasonableness. Therefore, the question of prejudice was not determinative of the state court's adjudication of this claim. Hunt has not established that the state court's adjudication of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, or that the state court's findings are unreasonable in light of the evidence presented.

2. Counsel's Closing Argument

Hunt also complains that counsel's closing argument at sentencing was so grossly improper as to constitute ineffective assistance of counsel. Hunt argues that counsel conceded the existence of certain aggravating circumstances and focused his entire closing argument on the immorality of the death penalty, rather than humanizing Hunt in the eyes of the jury and providing reasons why Hunt should not be sentenced to death. Hunt contends that, because the jury had been "death qualified," this type of argument was clearly ineffectual and offensive to the jury.

In considering this claim, the state court specifically found that, in the context of counsel's argument, Hunt's counsel did not concede the existence of any aggravating circumstances. MAR Order at 100. The state court further found that counsel's argument contained conventional themes often heard in death penalty cases and sought to present reasons to the jury why Hunt was not deserving of death. The state court concluded that counsel's closing

argument was professionally reasonable and neither deficient nor prejudicial. *Id.* at 100-01.

Hunt has not shown that the state court's adjudication of this claim was contrary to, or an unreasonable application of, clearly established federal law or was based upon an unreasonable determination of the facts in light of the evidence. The Court finds that the state court's findings are reasonable in light of the evidence presented at the MAR hearing.

Because Hunt has failed to meet his burden under 28 U.S.C. § 2254(d) as to Claim II of the petition, he is not entitled to habeas relief on this claim. Therefore, as to Claim II of the petition, Respondent's motion for summary judgment is hereby GRANTED.

C. Claim III — Withholding of Exculpatory Evidence

In his third claim, Hunt alleges that the prosecutor failed to disclose material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The allegedly exculpatory evidence withheld by law enforcement officers consisted of handwritten notes of two investigating officers summarizing their interviews with Jones. These notes reveal that Jones never told law enforcement officers that Hunt killed Ransom. Hunt contends that this information is material and exculpatory because it is "flatly inconsistent" with the State's theory of Hunt's alleged motive for killing Jones and because, when taken with other evidence presented at the MAR hearing, it could have been used to exonerate Hunt.

Hunt raised this claim in his MAR and the state court adjudicated this claim on the merits. Therefore, Hunt must establish that the state court's adjudication of this claim was contrary to, or an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts in light of the

evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d).

The suppression by the prosecution of exculpatory evidence material to the issue of guilt or punishment requested by the accused violates due process. *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97. In *United States v. Bagley*, the Supreme Court reiterated that the prosecutor's duty to disclose material evidence extends to impeachment evidence and that constitutional error occurs only where the suppressed evidence "is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381 (1985). More recently, the Supreme Court explained that

> *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995).

After reviewing this claim, the state court found that the withheld evidence was not exculpatory:

> [Hunt's] trial attorneys knew from interviewing Aggie Nora Hunt that she would say Jones told her Locklear was involved in Ransom's murder. This was consistent with the State's case, Locklear was involved. Cummings testified Hunt was

> angered that Jones was running his mouth about both the Evers larceny and Ransom murder. Jones' failure to name Hunt in discussions with investigators is not exculpatory evidence. It does not tend to show Hunt was not the killer.

MAR Order at 105.

Hunt contends that the state court erred by adopting an overly restrictive view of what constitutes evidence "favorable to the accused" and failing to consider the impeachment value of the withheld evidence. Hunt argues that the fact that Jones never once mentioned to the police that Hunt was involved in the Ransom murder is evidence favorable to him because it is inconsistent with the State's theory of Hunt's motive.

The Court finds no merit to this argument. The state court's finding that the evidence was not exculpatory is well-supported by the record. The fact that Jones never told law enforcement officers that Hunt killed Ransom does not refute the proffered motive that Jones knew of Hunt's involvement and was talking about it. Likewise, the withheld evidence does not tend to show that Hunt was not the killer.

Hunt also asserts that the suppressed evidence is material because it contradicts the testimony of Bernice Cummings and suggests that the State introduced testimony which it knew, or should have known, was false. In support of this argument, Hunt states that "Bernice Cummings testified at trial that Larry Jones had been telling the police that Mr. Hunt killed Jackie Ransom." Pet. for Writ of Hab. Corpus at 136. However, this argument is simply not supported by the record. Bernice Cummings did not testify that Jones had been telling the police that Hunt killed Ransom. Bernice Cummings testified that "Jones was out running his damn mouth" about Ransom and that Hunt said he was "going

to put a stop to his damn mouth." Trial Tr. at 2510. The fact that Jones never told the police that Hunt was Ransom's killer neither discredits nor impeaches Bernice Cummings' trial testimony.

Hunt has failed to establish that the state court's adjudication of his Brady claim is in any way contrary to, or an unreasonable application of, clearly established federal law. Therefore, Hunt is not entitled to any relief on this claim. Accordingly, as to Claim III of the petition, Respondent's motion for summary judgment is hereby GRANTED.

D. Claim IV — Other Constitutional Errors that Infected the Proceedings

Claim IV of the petition is comprised of the following six claims for relief: (1) his trial was joined with the trials of Elwell Barnes and A.R. Barnes for an improper purpose; (2) there was racial discrimination in the selection of the grand jury foreperson and the petit jury; (3) the jury was improperly death qualified; (4) his constitutional rights were violated when he was denied relief on several pre-trial motions; (5) the prosecutor made improper remarks during closing arguments; and (6) the jury instructions during the sentencing phase were improper and prejudicial. With the exception of the first claim relating to the issue of joinder, these claims were found by the state court to be procedurally barred under N.C. Gen. Stat. § 15A-1419(a)(2) and (a)(3). As for the claims found to be procedurally barred by the state court, Respondent argues that they are now procedurally defaulted.

Under the doctrine of procedural default, a federal court is precluded from reviewing the merits of any claim that was found to be procedurally barred by the state court on adequate and independent state grounds. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Coleman v. Thompson*, 501

U.S. 722, 731-32, 750, 111 S. Ct. 2546, 2555, 2565 (1991). A state rule is "adequate" if it is firmly established and regularly and consistently applied by the state court. *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987 (1988); *McCarver v. Lee*, 221 F.3d 583, 588 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 809 (2001). A state rule is "independent" if it does not depend upon a federal constitutional ruling. *Fisher v. Lee*, 215 F.3d 438, 445 (4th Cir. 2000) (citing *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S. Ct. 1087, 1092 (1985)), *cert. denied*, 121 S. Ct. 822 (2001).

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Section 15A-1419(a) of the North Carolina General Statutes, which sets forth the procedural bars under North Carolina law, provides:

> (a) The following are grounds for the denial of a motion for appropriate relief, including motions filed in capital cases:
>
> (1) Upon a previous motion . . . the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so . . . .

> (2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, ...
>
> (3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

N.C. Gen. Stat. § 15A-1419(a)(1995). Section 15A-l419(a)(3) consistently has been found to be an adequate and independent state law ground sufficient to establish procedural default. *See Bacon v. Lee*, 225 F.3d 470, 476 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1420 (2001); *Williams v. French*, 146 F.3d 203, 217-18 (4th Cir. 1998), *cert. denied*, 525 U.S. 1155, 119 S. Ct. 1061 (1999). However, § 15A-l419(a)(2), which is based upon the doctrine of *res judicata*, is not a proper ground upon which to base a procedural default: *See Green v. French*, 978 F. Supp. 242, 251-52 (E.D.N.C. 1997), *aff'd*, 143 F.3d 865 (4th Cir. 1998), *overruled on other grounds by, Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000); *see also Turner v. Williams*, 35 F.3d 872, 889-90 (4th Cir. 1994) (construing an analogous "raised and decided" rule in Virginia and holding that the Virginia court's dismissal of claims because they were raised and decided on direct appeal was "not a true procedural default rule").

With that background, the Court will proceed to address the six separate claims asserted under the heading of Claim IV. each of the claim s [sic]

1. Joinder of Hunt's trial with the trials of A.R. Barnes and Elwell Barnes

Hunt argues that it was error to consolidate his trial with the trials of A.R. Barnes and Elwell Barnes. Hunt

contends that this is so because he was prevented from using the recanted confession of A.R. Barnes to his full benefit. Hunt raised this claim on direct appeal and the North Carolina Supreme Court adjudicated this claim on the merits. Specifically, that Court found that Hunt had not shown any prejudice from the consolidation of trials and further noted that Hunt made no attempt at trial to call A.R. Barnes as a witness. *Hunt I*, 323 N.C. at 418-19, 373 S.E. 2d at 408-09. The North Carolina Supreme Court also noted that, even if the cases had not been consolidated, Hunt could not have compelled A.R. Barnes to testify at Hunt's trial if A.R. Barnes chose to exercise his right not to incriminate himself. *Id.*

Hunt argues summarily that he never had an opportunity to fully and fairly litigate the joinder issue. However, he raised the joinder issue before the North Carolina Supreme Court, and he has failed to show that the North Carolina Supreme Court's adjudication of this claim was in any respect contrary to, or an unreasonable application of, clearly established federal law.

Accordingly, Hunt has failed to establish that he is entitled to any relief on this claim.

2. Racial discrimination in selection of grand jury foreperson and petit jury.

Hunt contends that he was indicted by a grand jury on which Native Americans and African Americans have been substantially under represented as grand jury forepersons, and that, during jury selection, the prosecutor exercised his peremptory challenges to prevent Native Americans from serving on the jury and to minimize the number of African Americans on the jury. Hunt did not raise this claim on direct appeal, but raised it in his MAR. The state court found that Hunt was in a position to adequately raise this claim on direct appeal, but failed to

do so, and that, therefore, this claim was procedurally barred under N.C. Gen. Stat. § 15A-1419(a)(3).

Hunt argues that his failure to raise this claim on direct appeal was the result of ineffective assistance of counsel. Hunt further asserts that the state court erred in failing to consider the ineffective assistance of counsel aspect of this claim. Hunt contends that his counsel's ineffectiveness is sufficient to establish cause and prejudice to avoid a procedural default.

Cause and prejudice to avoid a procedural default may be established if a petitioner establishes that constitutionally ineffective assistance of counsel prevented him from raising the claim. However, a claim of ineffective assistance of counsel must be submitted to the state court as an independent claim before it may be used to establish cause for a procedural default. *See Murray v. Carrier*, 477 U.S. 478, 489, 106 S. Ct. 2639, 2646 (1991). For a petitioner to establish ineffective assistance of counsel sufficient to constitute cause and prejudice, "[i]t is not enough to show a possibility of prejudice; he must show that his attorney's failure to raise the issue worked to his actual and substantial disadvantage and infected his entire trial with error of constitutional dimensions." *Felton v. Barnett*, 912 F.2d 92, 97 (4th Cir. 1990). The loss of the right to a new trial, standing alone, is not sufficient to establish prejudice. *Id.*

Assuming that Hunt submitted to the state court his claim of ineffective assistance of counsel for failing to raise the discrimination claims on direct appeal, Hunt nonetheless has failed to allege in the petition any facts that would support his claim of ineffective assistance of counsel. Hunt has failed to establish that his counsel were constitutionally ineffective in failing to raise the discrimination claims on direct appeal. His generalized allegation in the petition that counsel's failure to raise a

discrimination claim on direct appeal was ineffective is not sufficient to establish that counsel's performance fell below an objective standard of reasonableness. As Respondent paints out, *Batson v. Kentucky*, 476 U.S. 79 (1986), upon which Hunt bases his claim challenging the prosecutor's use of peremptory challenges, was decided *after* Hunt was tried and convicted.

Moreover, Hunt has failed to show that he suffered actual prejudice as a result of counsel's conduct. Although Hunt argues that, if a discrimination claim had been raised on appeal he would have been entitled to a new trial, he provides no support for this argument.

Therefore, the Court finds that Hunt's claim alleging racial discrimination in the selection of the grand jury foreperson and the petit jury is procedurally defaulted.

3. Death Qualifying the Jury

Hunt contends that the jury in his case was improperly "death qualified". He also contends that his trial counsel were constitutionally ineffective for failing to rehabilitate prospective jurors that were challenged for cause. Hunt argues that, had counsel done so, at least one prospective juror could have been rehabilitated and would not have been removed for cause.

Hunt's claim that the jury was improperly "death qualified" was raised on direct appeal. Hunt did not submit any evidentiary support for this claim or identify any prospective jurors that were improperly removed for cause. The North Carolina Supreme Court overruled this assignment of error. *Hunt I*, 323 N.C. at 434, 373 S.E.2d at 417.

In his MAR, Hunt again raised the claim that the jury was improperly "death qualified", but also included a

claim that his trial counsel were ineffective in failing to rehabilitate potential jurors who were challenged for cause. He contended that at least one prospective juror who was removed for cause could have been rehabilitated. Hunt also claimed that his appellate counsel were ineffective for failing to provide evidentiary support for this claim when it was brought before the North Carolina Supreme Court. The state court found that the claim was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a)(2).

Respondent argues that this claim is procedurally defaulted. However, the state court's finding of procedural bar was based upon § 15A-1419(a)(2). That section is not a sufficient ground to support a finding of procedural default. *See Green*, 978 F. Supp. at 251-52. Thus, the Court finds that this claim is not procedurally defaulted.

Hunt does not allege that the North Carolina Supreme Court's adjudication of his claim concerning the "death qualifying" of the jury was in any respect improper or contrary to clearly established Federal law. Nor does Hunt allege that the trial court improperly excused certain jurors for cause. Hunt's only contention is that his trial counsel were ineffective for failing to rehabilitate prospective jurors who were challenged for cause. However, Hunt has failed to allege in his petition any facts to show how counsel were ineffective. Moreover, counsel has failed to show how his counsel's failure to rehabilitate jurors who were properly challenged for cause deprived him of a constitutional right. Indeed, Hunt cites no authority to establish that he had a constitutional right to rehabilitate jurors who otherwise were properly challenged for cause.

Accordingly, the Court finds that Hunt has failed to establish that he is entitled to any relief either on his

claim that the jury was improperly death qualified or on his claim that his counsel were constitutionally ineffective for failing to rehabilitate jurors challenged for cause.

4. The denial of (or the failure to bring) certain pretrial motions

Hunt also contends that his constitutional rights under the Sixth, Eighth and Fourteenth Amendments were violated as a result of the absence of relief on numerous pretrial motions, some of which were made by Hunt's trial counsel, but some of which were never made.

(i) Counsel's failure to obtain payment of fees for experts.

Hunt contends that his trial counsel were ineffective in failing to move for the payment of fees and costs for expert witnesses or otherwise to take advantage of the procedures for obtaining expert assistance. The state court adjudicated and denied this claim on the merits. Hunt has not shown that the state court's adjudication of this claim is contrary to, or involves an unreasonable application of, clearly established federal law. Therefore, Hunt is not entitled to any relief on this claim.

(ii) Counsel's failure to ascertain the State's compliance with discovery.

Hunt contends that his trial counsel were ineffective in failing to ascertain the extent to which the State had complied with Hunt's discovery requests. Hunt alleges that "[t]o the extent the State failed to provide Mr. Hunt with complete discovery, Mr. Hunt's counsel should have moved for an order granting a mistrial or dismissing the charges against Mr. Hunt, or in the alternative preventing the State from introducing evidence not disclosed." Pet. for Writ of Hab. Corpus at 144. However, Hunt does not identify how and the extent to which the

State allegedly failed to comply with discovery and he does not provide any specific factual allegations to support this claim. The state court found that this claim was procedurally barred under N.C. Gen. Stat. § 15A-1415(a)(3). Because this section is an adequate and independent state ground sufficient to support a procedural default, the Court finds that this claim is procedurally defaulted. Hunt has shown neither cause and prejudice nor that the failure to consider this claim will result in a miscarriage of justice and, therefore, this Court is precluded from reviewing this procedurally defaulted claim.

(iii) Counsel's failure to move for funds to secure the attendance of essential witnesses.

Hunt contends that counsel failed to move for funds for the attendance of essential witnesses at trial. However, Hunt does not identify a single witness who he contends was prevented from attending and testifying at trial as a result of counsel's failure. Hunt likewise provides no factual basis for why such a motion was needed. The state court found that this claim was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1415(a)(3). Because Hunt has made no showing of cause and prejudice to excuse a procedural default, or that the failure to consider the claim will result in a fundamental miscarriage of justice, the Court finds that this claim is procedurally defaulted.

(iv) Counsel's failure to secure complete recordation of the proceedings.

Hunt contends that his counsel were ineffective for failing to take the necessary steps to obtain complete recordation of all pretrial and trial proceedings. The state court found that this claim was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1415(a)(3). As Respondent points out, Hunt's counsel did move for

complete recordation of the proceedings. Hunt has failed to identify any proceedings that were not recorded. Accordingly, the Court finds that this claim is procedurally defaulted.

(v) Counsel's failure to challenge the constitutionality of the North Carolina death penalty statute.

Hunt contends that counsel should have brought a pre-trial motion challenging the constitutionality of North Carolina's death penalty statute. Hunt did challenge the constitutionality of North Carolina's death penalty statute on direct appeal. The North Carolina Supreme Court rejected the claim. Hunt then raised a similar challenge in his MAR and the state court held that the claim was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a)(2).

In the petition, Hunt provides no factual or legal basis for this claim. Thus, because Hunt has failed to establish that the North Carolina Supreme Court's adjudication of this claim was in any respect improper, the Court finds that Hunt is not entitled to relief on this claim.

(vi) A change of venue should have been granted.

Hunt's trial counsel made a motion to change venue based upon the pretrial publicity and notoriety that his case had received in Robeson County and the surrounding area. The trial court denied the motion. On direct appeal, Hunt assigned erred [sic] to the trial court's denial of his motion for change of venue. In overruling this assignment of error, the North Carolina Supreme Court found that:

> there was no evidence of the effect of the news reports on the residents of Robeson County other than the reports .... All jurors stated

> unequivocally that they could make their decisions unaffected by anything they had heard or read. We hold that we cannot disturb the ruling of the superior court that the defendant Hunt did not show it was "reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they may have formed."

Hunt I, 323 N.C. at 417, 373 S.E.2d at 408.

The North Carolina Supreme Court did not address the issue of counsel's effectiveness, or lack thereof, in providing evidentiary support for this motion. In his petition, Hunt provides no factual basis to support this claim and does not allege any prejudice resulting from counsel's alleged failure to provide evidentiary support for the change of venue motion. Hunt specifically has not shown that pretrial publicity prevented the jurors from considering only the evidence presented at trial without any prejudice or preconceived impressions. Thus, the Court finds that Hunt is not entitled to any relief on this claim.

(vii) Hunt was entitled to a continuance to allow pretrial publicity to subside.

Hunt contends that, because his motion to change venue was denied, he was entitled to a continuance so that pretrial publicity could subside, but his trial counsel failed to make such a motion. Hunt did not raise this claim on direct appeal, but raised it in his MAR. The state court found that this claim was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a)(3). Although Hunt contends that this claim was part of his overall ineffective assistance of counsel claim, he has failed to allege in his petition how counsel's performance was objectively unreasonable, or

how he was prejudiced as a result of counsel's performance, or otherwise to provide factual support for this claim. Nor has Hunt offered any evidence to refute the state court's finding of procedural default. Thus, the Court finds that Hunt is not entitled to any relief on this claim.

(viii) Denial of motion for individual voir dire and jury sequestration.

Hunt's trial counsel made a pretrial motion for individual voir dire and jury sequestration. The trial court denied the motion and Hunt raised that denial as an assignment of error on appeal. In overruling this assignment of error, the North Carolina Supreme Court found that Hunt had shown no abuse of discretion, "especially in light of the fact that 146 potential jurors eventually had to be examined, and in light of the fact that the trial judge did allow selective individual voir dire whenever defendant requested it." *Hunt II*, 323 N.C. at 417-18, 373 S.E.2d at 408. The North Carolina Supreme Court also found that Hunt was not prejudiced by any remarks made by the prospective jurors during voir dire. *Id.*

Hunt raised this claim in his MAR, and also alleged that his counsel was ineffective for failing to renew the motion for jury sequestration after it became clear that publicity about the trial undoubtedly would come before the jury. The state court found that this claim was procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a)(2).

This Court has reviewed the North Carolina Supreme Court's adjudication of Hunt's claim and finds that it is neither contrary to nor involves an unreasonable application of clearly established Federal law. As for Hunt's claim that counsel were ineffective for failing to renew the jury sequestration motion, Hunt has failed to

show either that counsel's performance was objectively unreasonable or resulted in prejudice. Thus, the Court finds that Hunt is not entitled to any relief on this claim.

(ix) Denial of Hunt's motion for an Order directing the State to identify all witnesses who testified before the grand jury.

Hunt contends that the trial court improperly denied his motion for an order directing the State to produce the names of all witnesses who testified before the grand jury and, for certain witnesses, to produce the substance of their testimony. Hunt raised this claim in his MAR. He did not present any evidence relating to this claim at the MAR hearing, and the state court denied this claim on the merits. Hunt has not shown how the state court's adjudication of this claim is in any way contrary to or an unreasonable application of clearly established federal law.

(x) Counsel's failure to move for sequestration of witnesses.

Hunt contends that his counsel provided ineffective assistance in failing to move for the sequestration of witnesses. Hunt did not raise this claim on direct appeal. However, he did raise it in his MAR. In denying this claim, the state court found that "[e]ssentially all the evidence at the MAR hearing tended to show that except for law enforcement officers, the State's witnesses were not in the courtroom when other witnesses were testifying and the in court testimony was not reported to witnesses waiting to testify." MAR Order at 107. Hunt has not shown that the state court's adjudication of this claim was in any respect contrary to or an unreasonable application of clearly established federal law.

For these reasons, the Court finds that Hunt is not entitled to any relief on his claim that the absence of relief

on certain pretrial motions deprived him of his constitutional rights.

5. Improper closing arguments made by the district attorney.

Hunt contends that the district attorney made improper statements during closing argument during the guilt phase that violated his rights under the Sixth, Eighth and Fourteenth Amendments. First, Hunt argues that the district attorney attempted to shift the burden of proof to Hunt. Second, Hunt argues that the district attorney made improper inflammatory remarks. Third, Hunt argues that the district attorney made statements that were unsupported by the evidence. In his petition, Hunt does not identify with any specificity the challenged comments or how or why they were improper. Instead, Hunt simply makes general references to certain pages of the trial transcript. Hunt also argues that his counsel was ineffective for failing to object to the improper comments of the district attorney.

The state court found that these claims were procedurally barred pursuant to N.C. Gen. Stat. § 15A-1419(a)(3) because they were not, but could have been, raised on direct appeal. In its motion for summary, Respondent argues that all of the district attorney's arguments were proper and fairly within the ambit of the evidence presented. Respondent also argues that, because the state court found these claims to be procedurally barred, these claims are procedurally defaulted and Hunt has not shown cause and prejudice to avoid the procedural default.

Although Hunt argues that the ineffectiveness of his counsel constitutes sufficient cause to avoid the procedural default, he fails to allege any specific facts to support or otherwise establish the two prongs of *Strickland*:

that counsel's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. The Court has reviewed the transcript pages cited by Hunt in support of his claims that the district attorney made improper and inflammatory comments during his argument and finds that the district attorney's closing arguments were supported by the evidence. Hunt has not shown how the challenged arguments were in any way improper. Thus, Hunt has failed to make a sufficient showing of ineffective assistance of counsel to establish cause to avoid the procedural default. Because Hunt has failed to establish cause and prejudice, the Court finds that this claim is procedurally defaulted.

6. The jury instructions during the sentencing phase were erroneous or improper.

Hunt contends that the jury instructions given during the sentencing phase violated his rights under the Sixth and Fourteenth Amendments in three respects. First, Hunt contends that the trial court erred in instructing the jury that it had no choice but to return a sentence of death if it found "any aggravating circumstances which you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances which you have found." Second, Hunt contends that the trial court erred in instructing the jury that it was entitled to consider all the evidence introduced during the guilt phase because this instruction left the jury with the impression that it could consider evidence that was introduced only as to one or both of his co-defendants. Third, Hunt contends that the trial court erred in instructing the jury that Hunt had the burden of establishing the existence of mitigating circumstances by a preponderance of the evidence, thereby suggesting to the jury that Hunt was required to prove at least one

mitigating circumstance when in fact a defendant is not required to produce any evidence in mitigation.

The state court found that these claims were procedurally barred under N.C. Gen. Stat. §15A-1419(a)(3) because Hunt was in a position adequately to raise them on direct appeal, but failed to do so. However, to avoid a finding of procedural default, Hunt argues that he received constitutionally ineffective assistance of counsel in that his counsel failed to object to these instructions at trial and failed to assign error to these instructions on direct appeal and that he presented this ineffectiveness claim to the state court.

In the petition, Hunt fails to allege any facts to support his claim that his counsel were ineffective for failing to object to the challenged instructions, and in failing to assign error to the instructions on appeal. Moreover, Hunt cites no legal authority to support his argument that the challenged instructions were constitutionally improper. The Court finds that Hunt has failed to establish good cause and prejudice and that, therefore, this claim is procedurally defaulted.

Accordingly, because Hunt has failed to established that he is entitled to relief on any of the claims asserted in Claim IV, Respondent's motion for summary judgment as to Claim IV of the petition is hereby GRANTED.

CONCLUSION

Upon consideration of the parties' arguments, and for the reasons discussed above, the Court finds that Hunt's claims are without merit. Hunt has not demonstrated that he is entitled to a writ of habeas corpus. Accordingly, Respondent's Motion for Summary Judgment is GRANTED and Hunt's Petition for a Writ of Habeas Corpus is hereby DISMISSED.

SO ORDERED.

This the 15th day of October, 2001.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
CHIEF UNITED STATES DISTRICT JUDGE

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HENRY LEE HUNT, *Petitioner-Appellant,* v.	)	
R.C. LEE, Warden, Central Prison Raleigh, North Carolina, *Respondent.*	)	No. 01-28

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, Chief District Judge.
(CA-97-873-5-HC-BO)
Argued: April 3, 2002

Decided: May 23, 2002

Before NIEMEYER, KING, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge King and Judge Gregory joined.

COUNSEL

ARGUED: D. Stuart Meiklejohn, New York, New York, for Petitioner-Appellant. Gerald Patrick Murphy, Special Deputy Attorney General, North Carolina Department Of Justice, Raleigh, North Carolina, for Respondent-Appellee.

ON BRIEF: Steven L. Holley, Richard C. Pepperman, II, Brent J. McIntosh, New York, New York; James R. Parish, Fayetteville, North Carolina, for Petitioner-Appellant. Roy Cooper, Attorney General of North Carolina, North Carolina Department of Justice, Raleigh, North Carolina, for Respondent-Appellee.

OPINION

NIEMEYER, Circuit Judge.

In 1985, Henry Lee Hunt was convicted in the Superior Court of Robeson County, North Carolina, of two counts of capital murder for the contract killing of Jackie Ransom and the witness-elimination killing of Larry Jones.

On appeal from the district court's denial of his petition for a writ of habeas corpus, brought under 28 U.S.C. § 2254, Hunt contends (1) that he received ineffective assistance of counsel during the sentencing phase of his state-court trial because his counsel failed to present any mitigating evidence and because his counsel's closing argument was inadequate, essentially requesting jury nullification, and (2) that the state failed to turn over police notes of an interview with Jones, the victim of the second murder, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which requires the state's disclosure of exculpatory information. Because we conclude that the state court's post-conviction decision rejecting these claims was neither contrary to clearly established federal law, as determined by the United States Supreme Court, nor involved an unreasonable application of that law, we affirm the district court's judgment based on the same conclusion.

I

At Hunt's state-court trial, the state prosecutor presented evidence that Dottie Ransom and her husband,

Rogers Locklear, hired Elwell Barnes for $2,000 to kill Jackie Ransom, Dottie Ransom's other husband. (Dottie Ransom married Jackie Ransom without divorcing Locklear.) Dottie Ransom's motive was to obtain the $25,000 proceeds from a life insurance policy that she purchased on Jackie Ransom's life so that she could buy a trailer home. Barnes recruited Henry Lee Hunt to help in the murder, and on September 9, 1984, Hunt advised Locklear that he had killed Jackie Ransom "last night" and demanded the $2,000 payment. Hunt threatened to kill Locklear and Dottie Ransom if Hunt was not paid within 30 days.

The next day, Hunt heard that Larry Jones, an acquaintance and a first cousin of Hunt's girlfriend, Bernice Cummings, was "running his mouth" by talking to the police about who had killed Jackie Ransom. Hunt told Cummings that "he was going to put a stop to [Jones'] damn mouth" and, on a separate occasion, that he was going to "kill that water-headed, ratting son-of-a-bitch Larry Jones."

During the evening of September 14, 1984, Hunt, Barnes and Jerome Ratley picked up the unsuspecting Jones and drove him to a deserted spot where Hunt shot Jones several times, point blank, telling him, "You don't eat no more cheese for no damn body else. I'll meet you in heaven or hell, one." When the three men dragged Jones out of the truck, he was still alive, so Hunt shot Jones again in the head.

After the bodies of Jackie Ransom and Jones were later discovered, one in Lumberton, North Carolina, and the other in Fairmont, North Carolina, 10 miles away, Hunt was indicted for two counts of capital murder and two counts of conspiracy to commit murder in connection with the murders of Jackie Ransom and Jones. The state court appointed two attorneys to represent Hunt, and he

was tried jointly with Barnes. Following trial, the jury convicted Hunt on both counts of capital murder.

At sentencing, Hunt's counsel elected not to put on any mitigating evidence, concluding that the risk of revealing more about Hunt's criminal background outweighed the benefit that could be obtained from the evidence. For his argument to the jury, counsel asked the jury, as an act of mercy and conscience, to spare Hunt's life. While briefly alluding to the fact that Hunt had a family and was not perfect and recognizing that aggravating factors existed, counsel rested his argument principally on the barbarism of the death penalty and the moral progress that would be made by sparing Hunt's life. The jury, answering special interrogatories, sentenced Hunt to death on each count of capital murder.

On direct appeal, the Supreme Court of North Carolina affirmed both Hunt's convictions and his sentences. *North Carolina v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (N.C.1988). The United States Supreme Court, however, vacated the North Carolina Supreme Court's judgment and remanded the case for a harmless- error review of an instruction given during the sentencing phase, in light of the Supreme Court's intervening decision in *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). *Hunt v. North Carolina*, 494 U.S. 1022, 110 S.Ct. 1464, 108 L.Ed.2d 602 (1990). On remand, the North Carolina Supreme Court found that any *McKoy* error was harmless and reinstated its previous judgments. *North Carolina v. Hunt*, 330 N.C. 501, 411 S.E.2d 806 (N.C.1992). The United States Supreme Court then denied Hunt's petition for a writ of certiorari. *Hunt v. North Carolina*, 505 U.S. 1226, 112 S.Ct. 3045, 120 L.Ed.2d 913 (1992).

With new counsel, Hunt filed a post-conviction Motion for Appropriate Relief ("MAR") in North Carolina

state court, requesting relief based on numerous violations of the United States and North Carolina constitutions. Following extensive hearings lasting five weeks, at which Hunt's original counsel testified about their trial strategy, the state court granted the state partial summary judgment. After a hearing on the remaining claims, the state court made findings of fact and conclusions of law, rejecting the remainder of Hunt's claims. The North Carolina Supreme Court denied Hunt's petition for a writ of certiorari from both the summary judgment and the state court's decision on his remaining claims. *North Carolina v. Hunt*, 336 N.C. 783, 447 S.E.2d 436 (N.C.1994); *North Carolina v. Hunt*, 345 N.C. 758, 485 S.E.2d 304 (N.C.1997). The United States Supreme Court also denied Hunt's petition for a writ of certiorari. *Hunt v. North Carolina*, 522 U.S. 861, 118 S.Ct. 163, 139 L.Ed.2d 107 (1997).

On April 10, 1998, Hunt filed a petition for writ of habeas corpus in the district court under 28 U.S.C. § 2254, alleging that he received ineffective assistance of counsel during both the guilt and sentencing phases of his trial on several grounds. He also claimed that the state failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Finally, he alleged six other miscellaneous violations of the United States Constitution. The district court granted the state's motion for summary judgment, rejecting all of Hunt's claims. This appeal followed. The district court granted a certificate of appealability as to Hunt's ineffective-assistance-of-counsel claim at the sentencing phase of trial and denied his claim based on the state's failure to comply with *Brady v. Maryland*. We granted a certificate of appealability on that claim.

II

In making his principal argument, Hunt contends that he received ineffective assistance of counsel during

the sentencing phase of his trial because his counsel "failed to present any mitigating evidence whatsoever and conceded the existence of aggravating circumstances, relying instead on a jury nullification argument based on general moral opposition to the death penalty." He argues that his counsel's performance denied him the right to have the effective assistance of counsel for his defense as guaranteed by the Sixth and Fourteenth Amendments.

Ruling on Hunt's post-conviction MAR in a detailed 110-page opinion, the Superior Court of Robeson County considered every argument that Hunt now presents and evaluated it against the standard for ineffective-assistance-of- counsel claims, as set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Following a detailed analysis of the claims, the court then concluded:

> [Hunt's counsel's] decision to not present evidence at penalty phase was reasonable. Hunt had rejected utilizing a psychiatrist. Neither Hunt nor his family members wanted to testify. Hunt's criminal record was significant and the details of the offenses had not come out. [Hunt's counsel] were confronted with putting on reluctant family members many of whom were linked to attempts to destroy evidence and intimidate witnesses. These problems were caused by Hunt. Moreover, Hunt's record contained prior bad acts which were not the subjects of convictions and the attorneys knew from discovery the State was going to try and link Hunt to other murders. They were concerned about opening the door. [Hunt's counsel's] performance at sentencing phase was not deficient. Any arguable errors did not prejudice Hunt.

Continuing its summary with respect to Hunt's challenge of his counsel's closing argument to the jury, the state court concluded:

> The Court has reviewed [counsel's] closing argument and finds it contains many conventional arguments often heard in death penalty cases. [Counsel] connected himself with Hunt telling the jury he was "proud to be in a position ... that I can speak to save somebody." He acknowledged the sorrow of the victims' loved ones but point[ed] out Hunt also had a family and the jury could exercise its choice to let him live. [Counsel] argued life imprisonment was substantial punishment and that any aggravating circumstances the jury may find simply were not substantial enough to warrant the death penalty.
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> * * *
>
> While [counsel's] argument clearly questioned whether capital punishment had any place in a civilized society, his argument was far from an all out attack on the death penalty. In the context of this case, [counsel's] argument was professionally reasonable and incorporated conventional subject matter often used in capital cases.... Hunt has failed to prove [counsel's] argument was either deficient or prejudicial.

On Hunt's federal habeas petition, the district court reviewed the state court's decision against the standard prescribed in 28 U.S.C. § 2254(d). With respect to these claims, the district court concluded that "Hunt has not established that the state court's adjudication of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, or that the state court's findings are unreasonable in light of the evidence

presented." Our review is *de novo,* applying the same standard applied by the district court. *See Savino v. Murray,* 82 F.3d 593, 598 (4th Cir.1996).

The law that Hunt seeks to apply respecting ineffective assistance of counsel was, at the time of his convictions, clearly established. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (setting forth the standard for establishing ineffective-assistance-of-counsel claims). Under *Strickland,* Hunt must demonstrate (1) that his counsel's performance was "deficient" in that it "fell below an objective standard of reasonableness" and "outside the wide range of professionally competent assistance," *id.* at 687-90, 104 S.Ct. 2052, and (2) that the deficient performance "prejudiced the defense" in that, "but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 687, 694, 104 S.Ct. 2052.

A court's evaluation of counsel's performance under this standard must be "highly deferential" so as not to "second-guess" the performance. *Id.* at 689, 104 S.Ct. 2052. To eliminate the distortions of hindsight, a court must evaluate counsel's performance "from counsel's perspective at the time." *Id.* Because of the difficulty of making this inquiry in the context of the wide range of reasonable strategic approaches, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks and citation omitted).

The question, therefore, is whether Hunt can demonstrate that the state court's rejection of his ineffective-assistance-of counsel claim was contrary to those clearly established principles or involved an

objectively unreasonable application of them. *See* 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). This standard is more stringent than reviewing for error or incorrectness. On habeas review, it is not sufficient in meeting the § 2254(d)(1) standard merely to find the state court's decision erroneous or incorrect; we must *also* find it unreasonable. *Williams*, 529 U.S. at 411, 120 S.Ct. 1495.

In this case, Hunt does not challenge the state court's factual findings as unreasonable in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(2). Rather, he contends it was error to apply *Strickland* to conclude that he received effective assistance of counsel when his counsel "failed to present any mitigating evidence whatsoever and conceded the existence of aggravating circumstances, relying instead on a jury nullification argument based on general moral opposition to the death penalty."

Hunt maintains that there were over 20 mitigating circumstances that could have been presented and that some witnesses were ready and willing to testify at Hunt's sentencing hearing. These mitigating circumstances fall into five general categories relating to (1) Hunt's impoverished and violent childhood, (2) his role as a supportive and giving father, (3) his service as a dependable and hardworking employee, (4) his good behavior in prison, and (5) his existing emotional and mental disturbances. At the state MAR hearing, Hunt's counsel testified that there were reasonable, strategic reasons for not introducing this evidence. They explained generally that after they "reviewed" an extensive list of possible mitigating factors, they spoke to several of the potential mitigating witnesses, such as Hunt's sisters Aggie Nora and Betty, Hunt's father, Sam Hunt, and Hunt's employer, discussing Hunt's "family background"

and his job performance. Counsel found that many potential witnesses were "scared" to talk about Hunt because of threats made to them. Although counsel did not interview every possible mitigating witness or track down every piece of potentially mitigating evidence, they became familiar with the nature, scope, and availability of mitigating evidence. Upon evaluating the potential mitigating evidence, counsel made a strategic decision not to put on any mitigating evidence because the damaging evidence that could have been elicited through cross-examination and from rebuttal witnesses would have outweighed any benefit to be claimed from the mitigating evidence. In addition, Hunt himself refused to subject himself to any psychiatric tests or interviews.

Specifically, with respect to Hunt's impoverished and violent childhood, Hunt's counsel could have shown that his father was an illiterate and violent alcoholic who was extremely abusive to Hunt and his 14 siblings, as well as to Hunt's mother. There was evidence that his father would have the children fight each other for his "amusement." Hunt's mother had an affair with Hunt's father's best friend and deserted the family in 1964, leaving them with nothing. She too was physically abusive to the children. The family was poor, and Hunt dropped out of school in the sixth grade. This evidence could have been presented either through Hunt himself or through one of his siblings, such as Aggie Nora, who discussed Hunt's childhood with Hunt's counsel during their 10-15 interviews. If counsel had proceeded to put Hunt or his sister on the stand, however, either could have been cross-examined about Hunt's prior criminal acts and criminal record. That record was extensive and included the unindicted murder of Wyles Jacobs, several armed robberies, Hunt's dynamiting of his mother's house, and a drug offense. Hunt's counsel were also concerned that Aggie Nora would testify about "other family members

being involved in trying to suppress or intimidate witnesses." There were indications that Hunt was trying to "get people to dispose of evidence ... or to threaten people to be quiet" while he was in prison. One of Hunt's brothers, Wilbert, had passed a gun to Bernice Cummings, Hunt's girlfriend, so that she could kill a potential witness to the Wyles Jacobs murder. Thus, counsel concluded that revelation of this violent and criminal background would have undone whatever benefit would have been gained from the evidence.

Hunt also argues that his counsel could have presented the testimony of Bernice Cummings about Hunt's role as a supportive and giving father. But putting Cummings on the witness stand also risked damaging revelations. For example, she had been kept in a protective custody program from the time of the murders until the time of trial because of her fear that Hunt would kill her and her fear of Hunt's family. Moreover, Cummings herself was involved in witness intimidation and obstruction of justice, as discussed above.

Hunt contends that his counsel should also have offered testimony at sentencing about Hunt's successful employment and his performance as a "willing, dependable, and responsible worker." But after speaking to Hunt's employer, Hunt's counsel concluded that such testimony would be decidedly double-edged. While the employer liked Hunt and felt that he was a good worker, he added that Hunt was "a man's man," meaning he was "scared of Mr. Hunt" and "no one would cross him." Hunt's counsel decided that if this evidence about good employment were introduced, it would also open the door to rebuttal testimony that Hunt's coworkers were afraid of him because of his various actions and to questions about whether the employer's view would be different in light of Hunt's criminal history.

Hunt also argues that counsel should have introduced testimony of prison guards who could have testified about Hunt's rehabilitation and good behavior in prison. But again, the evidence would have been double-edged. One of Hunt's prison guards testified at the post-conviction MAR hearing about an incident in which Hunt "hit [another prisoner] with a shank in the pit of his stomach ... [and] his intestines was coming out." This testimony might also have provided an opening to the introduction of other violent conduct in Hunt's past, negating the positive aspects of the guards' testimony.

Finally, Hunt asserts that his counsel should have introduced evidence from a psychiatrist about the fact that he was "neurologically impaired" in a way that "affected his ability to appreciate the criminality of his conduct." But during the trial, Hunt refused to be interviewed or examined by a psychiatrist. He was, however, interviewed by a psychiatrist after the trial, who concluded that Hunt did have a neurological impairment. Additionally, Hunt's counsel testified at the post-conviction MAR hearing that because Hunt had consistently maintained during the guilt phase that he had not committed the crime, such psychiatric evidence was irrelevant; it would have been relevant only on the implied assumption that Hunt had committed the murders.

The state court considered these matters at length and in greater depth than is summarized here and concluded that counsel's investigation of Hunt's social history "was clearly reasonable and sufficiently complete to support his strategic decision not to present social history evidence at the sentencing phase." And our review of the state MAR record confirms the district court's conclusion that not only were the factual determinations reasonable in light of the record, but also that the state court's determination was neither contrary to *Strickland*

nor an unreasonable application of its principles. *See* 28 U.S.C. § 2254(d).

Hunt argues nonetheless that the Supreme Court's decision in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389, supports his contention that it is an unreasonable application of *Strickland* to conclude that counsel can provide effective assistance when they fail to put on any available mitigating evidence. But neither the Supreme Court nor this court has ever held that it is *per se* ineffective assistance of counsel not to introduce mitigating evidence at sentencing. Indeed, in *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), the Court held that because the potentially mitigating evidence about the defendant's troubled family background was "by no means uniformly helpful to [the defendant] because they suggest violent tendencies," it was not objectively unreasonable not to introduce that evidence. *Id.* at 793, 107 S.Ct. 3114. Where defense counsel had interviewed "all potential witnesses who had been called to his attention" and had a "reasonable basis for his strategic decision that an explanation of [the defendant's] history would not have minimized the risk of the death penalty," his actions were reasonable and not constitutionally deficient. *Id.* at 794-95, 107 S.Ct. 3114. And the decision in *Williams v. Taylor* does not suggest otherwise. There, the Court found it to be ineffective assistance of counsel only where counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood." 529 U.S. at 395, 120 S.Ct. 1495. Thus, it was the failure to *investigate*, not the failure to *present*, mitigating evidence that led to the conclusion that the defendant had been denied effective assistance of counsel.

In this case, counsel had conducted a sufficient investigation to make the tactical decision that it would be more harmful to Hunt to present mitigating evidence than it would be not to present it. Thus, this case is more analogous to *Burger* and to our decision in *Bunch v. Thompson*, 949 F.2d 1354 (4th Cir.1991). In *Bunch*, we held that counsel did not render ineffective assistance when he failed to introduce sentencing testimony of the defendant's psychiatrist because, even though some of the evidence would have been "beneficial," there were also "risks involved if the psychiatrist had taken the stand." 949 F.2d at 1364. Some "harmful evidence would have emerged on cross-examination [sic]" that could have "reenforce[d] all the negative aspects of [the defendant's] self-destructive behavior." *Id.*

In short, the state court did not make an unreasonable application of *Strickland* in concluding that Hunt's counsel engaged in a reasonable investigation into possible mitigating factors and then made a reasonable strategic choice in not offering evidence of those factors because to do so would have opened the door to more damaging cross-examination or rebuttal evidence. Indeed, the state court was not even in error--a less demanding standard than "reasonableness"--in concluding that this legitimate and often- used trial strategy, based on a full investigation, did not constitute ineffective assistance of counsel. *See Burger*, 483 U.S. at 795, 107 S.Ct. 3114; *Bunch*, 949 F.2d at 1365.

Hunt also contends that his counsel provided ineffective assistance in making a closing argument to the jury that relied "on a jury nullification argument based on the supposed immorality of the death penalty." By presenting no mitigating evidence and acknowledging the existence of aggravating factors, Hunt claims, "the jury had no choice but to conclude that aggravating

circumstances outweighed mitigating circumstances" and was essentially forced to choose to impose a sentence of death. The state court concluded that not only was this argument not deficient, it was "often heard in capital cases."

While North Carolina law does require the jury to weigh aggravating and mitigating circumstances, it nevertheless authorizes the jury, based on this weighing to decide ultimately "whether the defendant should be sentenced to death or to imprisonment in the State's prison for life." N.C. Gen.Stat. § 15A-2000(b)(3). Consistent with this statute, the state trial judge submitted to the jury the special verdict interrogatory: "Do you unanimously find, beyond a reasonable doubt, that the aggravating circumstance or circumstances found by you is or are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstance or circumstances found by you." It was on the discretion given to the jury through § 15A-2000(3) and this interrogatory that counsel for Hunt focused during his closing argument.

Hunt's counsel pointed out to the jury that the prosecutor had "talk[ed] to you about death. I will talk to you about life." He then turned to the larger philosophical, moral and religious questions about life and death and requested the jury, in answering issue four on the verdict form, to find for life: "[The prosecutor], in all his grandeur, would suggest to you that Henry Lee Hunt should receive the death penalty and with equal grandeur, I will ask the question, 'Should he?' and I suggest to you that the answer is a resounding no ... You know, I understand that with all of life's human failures, and recognize, that with all of life's human short comings that to impose such a penalty of death is cruel and unnecessary." Hunt's counsel then appealed for mercy for

Hunt and his family: "Both Jackie Ransom and Larry Jones, I'm sure, left loved ones with tears and with sorrows.... You know, Henry Lee Hunt has a family, and, you know, today, Henry Lee Hunt doesn't have a choice, but you do.... If you want to punish Henry Lee Hunt, I suggest to let him live. You cannot punish him when he's dead." Focusing particularly on the fourth interrogatory submitted to the jury, Hunt's attorney stated: "I want you to think about whether any aggravating circumstances are sufficiently substantial for you to take this man's life in either one of those cases ... Now, his honor will instruct you that even if you find aggravating circumstances and no mitigating circumstances, you will still have a chance to answer Issue Number Four no."

It is true that Hunt's counsel spent some time talking about the history of the death penalty and its barbaric nature, indicating to the jury that its choice should be historically progressive in that the jury should not elect death as a method of punishing Hunt. Then returning to the present situation, counsel argued: "None of us are perfect. No, not even the least of us, but you do have the power to choose. You see, that is what separates you from Jackie Ransom, from Larry Jones, and Henry Lee Hunt. You can choose the love or hate.... You can say for these reasons I choose not to take Henry Lee Hunt's life."

The strategy that Hunt's counsel was pursuing was to find the one juror whose conscience would not permit a finding of death, even though the jury had been qualified for the death penalty, and to rely on the inadequacy of the aggravating circumstances to support a death sentence. Indeed, Hunt's counsel specifically appealed to jury vulnerability with this approach, arguing, "From the jury selection process, I have learned that some of you have just recently formed your attitudes and beliefs or opinions about capital punishment. You know, this is important to

me, because it reaffirms what I've always believed, that attitudes and opinions and beliefs are not contained in a vacuum during the life of an individual. Attitudes, opinions and beliefs do change over the experience, over life's experience in this earthly existence."

The state court at the MAR hearing found the argument conventional and well within the scope of reasonable arguments to be made in capital cases and concluded counsel's performance was not deficient.

But Hunt argues that he received ineffective assistance of counsel because his counsel failed to argue evidence to the jury that was specific to Hunt and his crimes, arguing instead against the death penalty based on moral or religious standards. In addition, he contends that his counsel should not have acknowledged "certainly, there are aggravating circumstances in these cases." As a result of this combination of errors, Hunt asserts that his counsel was improperly seeking jury nullification.

First, in view of the record, and Hunt's counsel's decision not to introduce evidence of mitigating factors, Hunt's counsel concluded that he could not focus on the specific weighing of aggravating and mitigating circumstances. He had elected, instead, to focus on interrogatory four that allowed the jury, *after* weighing the factors, to find that mercy outweighed the aggravating circumstances and the aggravating circumstances were not sufficient to justify the death penalty. *See, e.g., State v. Conner*, 345 N.C. 319, 480 S.E.2d 626, 632 (N.C.1997). While he acknowledged the existence of aggravating circumstances, counsel also indicated that Hunt had a family, that Hunt was not perfect, and that the more merciful course would be to spare Hunt's life. We cannot conclude that the state court's decision to find this argument reasonable in light of North Carolina law unreasonably applied the *Strickland* standard. The state

court found Hunt's argument typical of death penalty arguments, and, indeed, it may have been the strongest argument that Hunt's counsel could have made in light of the record.

Hunt nevertheless argues that it cannot be reasonable to approve an argument that improperly seeks jury nullification. Again, Hunt fails to recognize the scope of authority given to a jury in a North Carolina capital case. His counsel did not ask the jury to ignore the law; rather, he asked the jury to focus on the fourth interrogatory on the verdict form and determine whether the aggravating circumstances were sufficiently substantial that "the defendant should be sentenced to death." N.C. Gen.Stat. § 15A-2000(b)(3). In answering this interrogatory, the North Carolina Supreme Court has stated that it is not inappropriate to consider sympathy or mercy. *See Conner*, 480 S.E.2d at 632 (holding that while the court may not instruct that sympathy is a mitigating factor, the "catchall" mitigating factor phrase in N.C. Gen.Stat. § 15A 2000(f)(9) permits consideration of sympathy).

Finally, even though the closing argument carried a heavy religious and moral overlay, it was not error under North Carolina law to make such an argument in a capital case. *See North Carolina v. Barrett*, 343 N.C. 164, 469 S.E.2d 888, 899 (N.C.1996) (holding that prosecutor's closing argument that contained Biblical references was not reversible error and North Carolina has upheld such arguments as long as argument is not that State law is divinely inspired or that law officers are divinely ordained); *McDougall v. Dixon*, 921 F.2d 518, 539 (4th Cir.1990) (applying N.C. law). Indeed, in *McDougall*, we concluded that in a death penalty case, it was a "conventional argument" to discuss with the jury "the irrevocability of the death penalty verdict, the mitigating

factors in favor of the defendant, Biblical passages in support of mercy, other arguments indicating that the death penalty was not a proper solution for McDougall." *Id.* at 535. In that case, one of the counsel argued that the death penalty was "a cold blooded, premeditated killing by the state," quoting Clarence Darrow, Martin Luther King, Jr., and the Bible, "including a complete recitation of the Beatitudes." *Id.* at 536.

While some attorneys might consider the argument made by Hunt's counsel to have been a "desperate appeal," it nevertheless was an "appeal ... made with full knowledge of the facts and the law, and the options available to him." *McDougall*, 921 F.2d at 537. In these circumstances, we cannot conclude that the state court's finding that Hunt received effective assistance of counsel was an unreasonable application of *Strickland*.

III

Hunt also contends that the State violated his rights under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it failed to turn over police notes documenting Larry Jones' conversations with police officers. Hunt argues that the notes were both exculpatory and material to his defense.

These police notes would have revealed that Jones had been talking to the police but had not identified Hunt as Ransom's killer. Hunt argues that the notes should have been turned over as exculpatory because they could have been used (1) to bolster the testimony of defense witnesses about Hunt's lack of motive to kill Jones, (2) to show that Hunt did not commit the crime, and (3) to impeach the testimony of Bernice Cummings who testified that, according to Hunt, Larry Jones had been "running his mouth" about the Ransom murder and that Hunt "would put a stop to his damn mouth." Hunt argues that this

evidence would have demonstrated, contrary to Bernice Cummings' testimony, that Jones was not in fact running his mouth.

Hunt's argument, however, overlooks the state's theory that Hunt killed Jones because Hunt *believed* that Jones was talking to the police and telling them that Hunt killed Ransom. It is irrelevant whether Jones had actually told the police that Hunt was Ransom's killer. The critical issue is whether Hunt believed that Jones was telling the police that Hunt was the killer. And on that point, there was ample evidence to support the motive, given Hunt's statement to Cummings that he was going to "kill that water-headed, ratting son-of-a-bitch Larry Jones." Moreover, the notes confirmed that Jones had been talking ("running his damn mouth") to the police, which would only serve to bolster evidence of Hunt's motive given that there was no way for Hunt to have known exactly what Jones was telling the police.

Hunt's *Brady* claim is without merit and it follows that the state court's conclusion that the failure to turn over the notes did not violate *Brady* was not an unreasonable application of federal law. *See Williams*, 529 U.S. at 413, 120 S.Ct. 1495.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

NORTH CAROLINA ROBESON COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA, Plaintiff, vs HENRY LEE HUNT, and ELWELL BARNES, Defendants.	) No. 85-CRS-4546, 4547) No. 85-CRS-9428, 9430)) No. 84-CRS-15955) No. 85-CRS-1059) No. 85-CRS-9429) No. 85-CRS-14548)

SUPERIOR COURT CRIMINAL SESSION
NOVEMBER 18 THROUGH DECEMBER 20, 1985
HONORABLE GILES R. CLARK, JUDGE PRESIDING
REPORTER'S TRANSCRIPT ON APPEAL

APPEARANCES:

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THE COURT: All right. Members of the Jury, if you will give your attention, Counsel will continue their arguments.

Jury is with defendants for argument.

MR. THOMPSON: May it please the Court, Mr. Huggins, Mr. Britt.

Ladies and Gentlemen of the Jury, this is the first time that I actually had a chance to speak to you, and it would also be the last opportunity that I will have a chance to speak to you during this trial.

You know what I'm doing now is known in the common vernacular as a jury argument. But to me, that's really a misnomer. It's really just a closing statement. I can't argue with you. I can only talk to you. Mr. Britt talks to you about death. I will talk to you about life. You hear me, but I won't hear you until you go into the jury room to deliberate and bring back your recommendation as to a sentence. Though you will hear the thought processes of my mind, I will not know the collective thought processes of your mind until you bring that recommendation back.

Now, Mr. Baker and myself have tried to be an effective mouthpiece for Henry Lee Hunt, the defendant, throughout this trial. Even with our human failings, I'm now called upon to speak in an attempt to save Henry Lee Hunt's life.

Mr. Britt is the mouthpiece of the State or North Carolina, but I dare say, on the issue before you at this time, life or death, many North Carolinians speak and walk to the beat of a different drummer.

When will we, as a society, ever grow up and come of age? Mr. Britt, in all his grandeur, would suggest to you that Henry Lee Hunt should receive the death penalty and

with equal grandeur, I will ask the question, "Should he?" And I suggest to you that the answer is a resounding no.

You know, I'm proud to be in, a position that I am that I can speak to save somebody. You know, I understand that with all of lifes human failures, and recognize, that with all of lifes human short comings that to impose such a penalty of death is cruel and unnecessary.

Now, Jackie Ransom was a human being. And so was Larry Jones. And on or about September the 8th of 1984, Jackie Ransom didn't have a choice. And on or about September the 14th of 1984, Larry Jones didn't have a choice.

Mr. Britt mentioned that he didn't know – or they didn't have a chance to get right with their Maker. Well, I don't know that, and I hope they did. I know that I'm trying to get right with mine, now, and all of us should be trying to get right with our Maker, but I know that no one knows the time or the reason when death falls upon us. And, you know, both Jackie Ransom and Larry Jones, I'm sure, left loved ones with tears and with sorrows.

There are even times in our lives when choices have been made by somebody else which affects the very quality of existence of our lives and with modern nuclear warfare, there may be choices which may very well affect our very existence.

You know, Henry Lee Hunt has a family, and, you know, today, Henry Lee Hunt doesn't have a choice, but you do. I suggest to you that life is natural and so is death, but if you impose death, it becomes artificial and it becomes unnatural.

I submit to you that it is not an unpleasant choice if you allow Henry Lee Hunt to live, but, oh, how many souls will die if your choice is death?

You know, you can only punish the living. You can't punish the dead. If you want to punish Henry Lee Hunt, I suggest to let him live. You cannot punish him when he's dead.

Now, Your Honor will instruct you that as to the prior convictions of Henry Lee Hunt, there's no evidence that those crimes involved the use of violence to any person, and, of course, as to the armed robbery, the very nature of the crime itself involves the use of threat, and with respect to those charges, there was no evidence of — that there was actual use of violence toward any person.

Certainly, there are aggravating circumstances in these cases. However, Your Honor will instruct you that from the evidence presented to you, you may find mitigating circumstances.

What about Dottie Ransom? What about Rogers Locklear? What about A.R. Barnes? What does the future hold for them?

There will be an instruction which Your Honor will give you, both in the Jackie Ransom and the Larry Jones' homicides, which I want to direct your attention to. It will appear as Issue Four on your sentence recommendation sheet.

Now, when and if you ever reach that issue, I want you to search your souls, your morals and your Christian values, and whether you are Holiness, Presbyterian, Methodist, Baptist, or what ever, I want you to think about whether any aggravating circumstances are sufficiently substantial for you to take this man's life in either one of those cases.

I suggest to you that the law of North Carolina permits you to answer Issue Four no, because our Legislators had wisdom enough to realize that there may come a time when we will come of age and find that the

death penalty is totally demoralizing and has no useful value in a civilized society.

Now, His Honor will instruct you that even if you find aggravating circumstances and no mitigating circumstances, you will still have a chance to answer Issue Number Four no, because those aggravating circumstances that you do find – and I suggest to you that they will have no value, weight, consequence of any significance which will prove to be substantial enough for the imposition, of the death penalty.

Now, each of you must decide, each one of you must decide in your own individual mind as to the sentence to be imposed against Henry Lee Hunt, and in order for you to impose death, you must all agree.

I say to you that it's time for somebody to come of age. There's no victory in sentencing a man to death.

I want you to think about punishment for awhile. You know what are the essentials, what are the reasons for punishment? You know it's generally accepted that there are three essential ingredients of all punishment. All three ingredients must be present or otherwise the punishment is defective. It's not vengeance for vengeance sake.

First of all, punishment is for the offender. Secondly, punishment is for the rehabilitation, restoration of the offender to a useful and productive life or citizenship. And thirdly, it is for the protection of society by deterring others from committing similar crimes. That's what punishment is about.

And I can suggest to you that we may summarily dispose of the first ingredient, because death by electrocution, or by lethal injection definitely full fills the essentials of punishment of the offender, but I'm sure that even the District Attorney, when talking about the second ingredient, would have to concede that death is fairly

permanent. And when this penalty is imposed, certainly there is no chance for rehabilitation or restoration to the community, but you know this leads to consideration of the third ingredient, and this particular ingredient over shadows the other two, and that is: Does it protect society by deterring others from committing similar crimes? Does the death penalty serve as a warning to others? Does it keep others from committing similar crimes? An answer to that, I suggest, is a resounding no.

You know, we may all agree that we are living in an age when we have witnessed more brutality and slaughter than all our ancestors, since the birth of Christ. Yet, this is perhaps why some of our citizens of this State don't worry too much about the death of one man. You know, we may have become inoculated against the brutality of human suffering.

The jury selection process in this trial has shown us that even God-fearing questions differ with respect to the sanctity of human life. Some of our citizens believe that a convicted murderer, under some circumstances, should receive the death penalty, and some do not. The jury selection process showed us that.

From the jury selection process, I have learned that some of you have just recently formed your attitudes and beliefs or opinions about capital punishment. You know, this is important to me, because it reaffirms what I have always believed, that attitudes and opinions and beliefs are not contained in a vacuum during the life of an individual. Attitudes, opinions and beliefs do change over the experience, over lifes experience in this earthly existence.

You say, "I believe in the death penalty because there are so many killings." I say to you my whole being rebels at such life. You know, I'm morally persuaded that throughout the history of time, each generation has

become successively better in views of punishment and sanctity of human life, but many of us have still not arrived.

I submit, there was a time when society thought that criminals should be beheaded, burned, boiled and buried alive; when they thought that criminals should be strangled, stoned, skinned or starved to death; when they were torn asunder by trees, fastened to the limbs; when they were forced to drink poison, crucified or drowned; when they were chopped in two while still alive, and all of this in the name of justice, and all of this because it was the law of the State.

Now, as odious and savage as these practices sound to us today, generations to follow will and, yes, even us may come of age when capital punishment has long been banished from this earth. You know, as it has in most civilized countries and in even some of our states in these United States.

You know, electrocution and lethal injection – which is no more than poisoning, as another barbarous punishment – I say will vanish, for I submit to you any punishment that takes the very life of a human being is cruel, immoral and uncivilized, and a throw back to the dark ages. That no aggravating circumstance in this case is sufficiently substantial to call for such behavior.

You know, I would like to paraphrase the words of a jurist, and I did some thinking last night, too, but it became ever increasingly clear to me exactly what those words mean – if I can paraphrase him, He said that history makes clear that what once was natural and self-evident becomes, in time, unnatural, artificial and unacceptable.

I want to repeat that, and I want you to think about it: History makes clear that what was once natural and

self-evident in time becomes unnatural, artificial and unacceptable.

It was so with the burning, the boiling and the burying of criminals alive. It was so with the stoning, the skinning and starving them to death, and it was so with the guillotine that chopped them in two while they were alive. It was so with hanging. In 1801, a British child was hanged for stealing a spoon. Why? Because it was the law of the State.

There is a case of a twelve-year old American boy who was hanged for stealing a sheep. Why? Because it was the law of the State.

You know, during the rein of Henry the Eighth, there were crimes ranging from killing rabbits to associating with gypsies for which the death penalty was exacted. Why? Because it was the law of the State.

Will the death penalty deter others from crime? Is it inhumane, the law of the State, you say? No doubt bloody Queen Mary was actuated by the noblest of nobles, but for all the blood she drew, crime continued unabated in merry old England. There was a time in England when pick pockets were hanged. And when the public hanging took place, the pick pockets would gather and pick the pockets of those who attended the execution. And crime continues unabated.

Has the death penalty deterred thousands of Americans who commit murder? You know, non-justifiable homicide – and these are what we are dealing with, they are generally, basically one or two forms. They are those where the murderer takes the life of another out of anger, and he loses control of his faculties, and therefore the consequences of his dead never come to his mouth, and then there is a second type, and that is where if the murder is premeditated, if it is planned, – but you know,

in that case, the murderer, when he plans it, he thinks he has the perfect plan and will never be apprehended and so he never gives any thought to punishment.

So, again, I ask you where is the deterrence? There is no deterrence. Bazaar punishments have adversely even affected law enforcement.

You know, one of the most famous of all English hangmen was John Price, and, you know, he was hanged himself for murder? So, was hangman Dennis and hangmen Hessels. You know that history makes clear what once was artificial in time becomes unnatural, becomes artificial, becomes barbaric.

There is another compelling argument, or reason against capital punishment. It is the possibility of mistake. And, particularly, even in a case like this. You know every lawyer knows that bold, bald and unblushing perjury all to frequently stalks in to these hallowed walls and makes a mockery out of the intangible commodity we call justice.

And I am reminded of an old folk song on how America harkened to the saga of Tom Dooley. Some of you may have heard of that song. As he headed for the gallows, as he hung his head in shame before he was executed, but I wonder how many know that that song was written about a North Carolina man. His name was Tom Dula, (Spelling) D-U-L-A, who was convicted of murdering a young lady acquaintance and was hanged because it was the law of the State. Unfortunately for Tom Dula, it was a number of years before the real murderer confessed. So many times have the innocent been mistaken and wrongly convicted.

You gave your verdicts in these cases, and I suggest that you be proud of it, but I'm asking you, now, to be proud and recommend a sentence of life.

All of this will be history in a little while, but even history lives. Sons and daughters born and unborn will talk about it. They will talk about crime and punishment in this century, in this State, and this County, and they will talk about a way of life, and they will talk about history as I have.

Now, Mr. Britt read you a bit of Biblical passages, and you know, I guess, unbeknownst to Mr. Britt, I wasn't going to make any Biblical argument, but I guess I'm compelled to talk to you a little bit about what he read to you.

The Good Book. You know, just as patriotism is the last refuge of the scoundrel, the Bible is the favorite stamping ground for those who enjoy quoting scriptures for their own purposes.

You know, there are cases we are talking about – first of all, I want you to know, and you do know, I'm sure, this is a book of history. You've seen books of world history, American history. This is a book of history, although written by people of divine inspiration. That's the difference, but there are great cases recorded in this book that have historical significance.

You know, God himself set the first precedent with Cain and Abel. You know, when Cain gazed upon the beaten and bleeding body of his own brother, you know, he expected the vengeance, of every nation, but God did not visit capital punishment on him. Instead, what did he do? He banished him from society. He placed a mark upon him, but also a mark that would warn the rest of mankind against destruction.

Well, then, there is the case of David, who was responsible for the death of Uriah, the Hittite. David, who was not executed, but continued, in spite of his heinous

crime, to grow in favor, not only in the sight of God, but in the sight of man.

What about Moses, who slew the Egyptian in a fit of anger, and who became a fugitive of justice. The murder who came from Egypt to the heights of Pi Hahiroth, across the Red Sea, surveyed the promise land from Dan to Bathsheba. What if David and Moses had been executed because it was the law of the State?

Now, he quotes from you a little bit of Mosaic law, from the Book of Exodus. You know, when Mr. Britt quoted that and cited that authority, he cited it to show, I guess, God's power over – that God's power over life and death was given, committed to his creatures, such as human beings.

Well, he overlooked a number of significant factors. First of all, the Lord delivered to Moses amid the fire and flames and the smoke of Mount Sinai, could be divided in three parts. Moral, political and judicial.

Now, listen, the moral law was the Ten Commandments, and it's universal in its operation and perpetual in his obligation, but the political and judicial laws are only of interest from a standpoint of Biblical history. They constituted a civil and a criminal code for the people to whom they were given, and I suggest to you that their authority commanding the infliction of capital punishment is no more binding on the Christian Nation than the laws of the Medes or the Persians, or any of the other various tribes that were driven from Canaan, and by the sword of Gideon.

I'm saying this also is a book of history. Laws do change and when God gave Noah – you talking about the Noahian Laws. He gave him the direct and divine authority to take another's life only to perpetuate his purposes in heaven, but no such direct and divine

authority that I know of has been given to the State of North Carolina.

You know, I ask you, individually, again, that you find no factors that you answer Issue Number Four no, and that you find no factor substantial enough for the imposition of the death penalty.

Remember, history makes clear that what once was natural in time becomes unnatural. Add too, beliefs and opinions are not formed in a vacuum. They do change. Yours have changed over lifes experiences. It was so with slavery, and I suggest that it will be so with capital punishment.

None of us knows what the future holds. We can remember the aging of a civilized society and what the past has shown us. Who has received the direct and the divine authority to take this man's life? None of us are perfect. No, not even the least of us, but you do have the power to choose.

You see, that is what separates you from Jackie Ransom, from Larry Jones, and Henry Lee Hunt. You can choose the love or hate. You can give or you can take. You can build or destroy. You can throw a rock. Live or let live. Kill or let die, and you will make history. You will go home and you will look back into the sands of time and you can say to all your friends and your loved ones that you can only punish the living. You cannot punish the dead.

That history makes clear what once was natural, socially acceptable, self-evident in time, becomes unnatural, unacceptable and barbaric behavior, and you can say for these reasons I chose not to take Henry Lee Hunt's life.

I thank you. And on behalf of Mr. Baker, my co-counsel, and the defendant Henry Lee Hunt, may God bless you.

THE COURT: Mr. Huggins, the jury is with you, sir.

Supreme Court, U.S.
FILED
OCT 23 200
CLERK

No. 02-287

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY LEE HUNT,
Petitioner,
v.
R.C. LEE, WARDEN,
CENTRAL PRISON,
RALEIGH, NORTH CAROLINA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FOURTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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October 23, 2002

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28 pp

CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

I. **IS THE COURT OF APPEALS' DISPOSITION OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS?**

II. **IS THE COURT OF APPEALS' DISPOSITION OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN CONFLICT WITH DECISIONS OF THIS COURT?**

III. **DID THE COURT OF APPEALS UTILIZE AN OVERLY NARROW STANDARD IN CONFLICT WITH DECISIONS OF THIS COURT WHEN IT RULED THAT CONVERSATIONS BETWEEN ONE OF THE VICTIMS AND POLICE OFFICERS WERE NOT BRADY MATERIAL?**

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No. 02-287

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RESPONDENT'S BRIEF IN OPPOSITION

CITATION TO OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals is published at *Hunt v. Lee*, 291 F.3d 284 (4th Cir. 2002).

JURISDICTION, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Supreme Court Rules 15.2 and 24.2, these items are omitted since the State is satisfied with Petitioner's statements of Jurisdiction, and Constitutional Amendments and Statutes involved.

STATEMENT OF THE CASE

The body of Jackie Ransom was found in Lumberton, North Carolina, on September 9, 1984. An autopsy showed he died from a single gunshot wound to the head. The body of Larry Jones was discovered in a shallow grave near Fairmont, North Carolina, on October 1, 1984. Jones died from multiple gunshot wounds on the evening of September 14, 1984.

In May 1985, Petitioner Henry Lee Hunt was indicted for both murders and Angus B. Thompson, Jr. and H. Mitchell Baker were appointed to represent him. Hunt was tried at the November 18, 1985, Session of Superior Court, Robeson County, convicted of first degree murder in both cases, and sentenced to death in each case. On direct appeal, the Supreme Court of North Carolina found no error in either the guilt or sentencing phase. *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988). Hunt sought certiorari review. This Court vacated the judgments in light of *McKoy v. North Carolina*, 494 U.S. 433 (1990) and remanded to the Supreme Court of North Carolina for harmless error review of the penalty phase unanimity instruction. *Hunt v. North Carolina*, 494 U.S. 1022 (1990). On remand, the state court found the unanimity instruction harmless beyond a reasonable doubt and reinstated the judgments. *State v. Hunt*, 330 N.C. 501, 411 S.E.2d 806, *cert. denied*, 505 U.S. 1226 (1992). On December 3, 1992, Hunt filed a motion for appropriate relief [MAR] in state superior court pursuant to North Carolina General Statutes 15A-1411 *et. seq*. Numerous claims were ruled procedurally barred on June

2, 1994; Hunt's petition for writ of certiorari to review that order was denied by the Supreme Court of North Carolina on August 10, 1994, *State v. Hunt,* 336 N.C. 783, 447 S.E.2d 436 (1994). A hearing was conducted on the remaining claims beginning September 12, 1994. The MAR hearing lasted approximately five weeks. On September 16, 1996, the superior court entered an order denying Hunt's remaining MAR claims. Hunt's certiorari petition to the Supreme Court of North Carolina to review the superior court's order was denied April 10, 1997. *State v. Hunt,* 345 N.C. 758, 485 S.E.2d 304, *cert. denied,* 522 U.S. 861 (1997). Hunt filed his habeas petition on April 10, 1998. The petition was denied by the United States District Court for the Eastern District of North Carolina by judgment entered on October 16, 2001. On May 23, 2002, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court. *Hunt v. Lee,* 291 F.3d 284 (4th Cir. 2002).

STATEMENT OF THE FACTS

The facts and circumstances of Hunt's crimes are succinctly stated in the opinion of the United States District Court for the Eastern District of North Carolina which summary was incorporated in the opinion of the court of appeals. (Pet. App. at 1a-6a, 42a-45a)

REASONS WHY WRIT SHOULD NOT BE GRANTED

I. The Fourth Circuit's Disposition of Hunt's Ineffective Assistance of Counsel Claims Is Not in Conflict with Other Circuits.

Hunt claims he was denied the effective assistance of counsel guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Hunt argues he received ineffective assistance of counsel [IAC] at the sentencing phase of his capital trial because, according to Hunt, trial counsel 1) failed to present any mitigating evidence to counter the State's portrayal of Hunt as a cold - blooded contract killer; 2) conceded the existence of aggravating circumstances; and 3) relied solely on jury nullification in sentencing summation. In the first section of his petition, Hunt claims that the Fourth Circuit's opinion - which found that the state superior court's disposition of Hunt's IAC claim was not contrary to, nor an unreasonable application of, this Court's precedent - conflicts with decisions of other circuit courts. The State contends Hunt's argument is without merit.

The law applicable to Hunt's claim is well-established. In order to prevail upon his IAC claims under *Strickland*, Hunt must establish, first, that counsel's performance was constitutionally deficient, and second, that the deficient performance prejudiced the defense so as to deprive him of a fair trial. The second prong of *Strickland* requires Hunt to demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 446 U.S. at 694. The burden of proving these requirements is heavy because counsel is strongly presumed to have rendered effective assistance. *Id.* With the luxury of a made record, it is wholly unremarkable that post-conviction counsel will identify areas to criticize trial counsel's actions and decisions. Such alleged shortcomings do not amount to denial of effective assistance of counsel. *Waters v. Thomas*, 46 F.3d 1506, 1513 (11th Cir. 1995).

In reviewing the procedural history of Hunt's IAC claim in the lower courts, the Fourth Circuit observed that in "[r]uling on Hunt's post-conviction MAR in a detailed 110-page opinion, the Superior Court of Robeson County considered every argument that Hunt now presents and evaluated it against the standard for ineffective-assistance-of-counsel claims, as set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)." *Hunt v. Lee*, 291 F.3d at 288. Regarding the action of the district court in Hunt's habeas proceeding, the Fourth Circuit noted "the district court concluded that 'Hunt has not established that the state court's adjudication of this claim was contrary to, or involved an unreasonable application of, clearly established federal law, or that the state court's findings are unreasonable in light of the evidence presented.'" Noting its review is *de novo*, applying the same standard applied by the district court, *Savino v. Murray*, 82 F.3d 593, 598 (4th Cir. 1996), the Fourth Circuit clearly stated the standard of review as follows:

> The question, therefore, is whether Hunt can demonstrate that the state court's rejection of his ineffective-assistance-of counsel claim was contrary to those clearly established principles or involved an objectively unreasonable application of them. See 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 409, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000). This standard is more stringent than reviewing for error or incorrectness. On habeas review, it is not sufficient in meeting the § 2254(d)(1) standard merely to find the state court's decision erroneous or incorrect; we must also find it unreasonable. *Williams*, 529 U.S. at 411.

Hunt v. Lee, 291 F.3d at 289-290.

To support his certiorari petition, Hunt first argues the Fourth Circuit's disposition of his IAC claim conflicts with an opinion of the Seventh Circuit. As a basis for this alleged conflict, Hunt focuses on trial counsel's closing argument - specifically that part related to discussion of individual mitigating circumstances - and asserts trial counsel failed to "tailor" closing argument to Hunt's specific circumstances. In presenting this claim, Hunt ignores and utterly fails to address the circumstances under which counsel was forced, as a result of Hunt's own conduct, to make his closing argument. In *Strickland*, this Court recognized that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. 691.

This quoted language from *Strickland* surely was written with cases like the one at bar in mind. A review of the circumstances of Hunt's case is important to fully understand the situation in which trial counsel found himself going into closing argument and to put Hunt's "tailoring" claim in perspective.

The nature of the murders Hunt committed speaks volumes about Hunt's character. For instance, the Ransom murder was a contract killing which Hunt agreed to perform after only a ten minute conversation with his co-conspirator; the Jones murder was a witness elimination killing executed by Hunt to silence the mouth of Jones whom Hunt referred to as a "water headed ratting son-of-a-bitch." The Supreme Court of North Carolina and the superior court which heard Hunt's post-conviction claims both described the evidence of Hunt's guilt as overwhelming. *State v. Hunt*, 330 N.C. at 512, 411 S.E.2d at 811.

Following his arrest for the murders, Hunt's bad character continued to manifest itself. The State's evidence related to the circumstances of the killings alone was overwhelming and highly illuminating of Hunt's character, but what makes the State's evidence of guilt especially overwhelming is the evidence of Hunt's attempts, after the killings, to intimidate witnesses and destroy incriminating evidence. Hunt's family members joined with him in threatening witnesses and attempting to destroying evidence. As a result, Hunt limited viable sources of mitigating evidence available to his trial counsel in addition to producing additional incriminating evidence for the State related to Hunt's bad

character. The district court's order documents the involvement of family members in these obstruction of justice activities. (Pet. App. at 18a-19a) Ignoring his witness intimidation efforts and the hardship it caused trial counsel during their investigation of mitigating evidence and defense of his case, Hunt alleges counsel's failure to focus on his individual circumstances in closing argument resulted from an absolute failure of trial counsel to investigate and present mitigating circumstances. As noted above, Hunt's contention is soundly contradicted by the facts in the record and is myopic in its assessment of the case. A review of the alleged potential mitigating evidence proffered by Hunt at the MAR convincingly demonstrates Hunt's "failure to investigate" allegation is meritless.

To support his baseless allegation that trial counsel failed to investigate mitigating evidence, Hunt claims there were at least 20 mitigating factors that should have been presented, and that numerous witnesses were ready and willing to testify at petitioner's sentencing hearing. The facts do not bear this out. The Court of Appeals categorized these proposed circumstances, stating they "fall into five general categories relating to (1) Hunt's impoverished and violent childhood, (2) his role as a supportive and giving father, (3) his service as a dependable and hardworking employee, (4) his good behavior in prison, and (5) his existing emotional and mental disturbances." (Pet. App. at 49a)

The MAR evidence established that prior to the sentencing hearing, trial counsel investigated possible

mitigating factors, and spoke to potential witnesses. As it turned out, counsel determined **none of them** would be useful for the purpose of mitigation at the sentencing hearing largely due to Hunt's witness intimidation activities. Hunt complains trial counsel did not bring forth any evidence regarding his "impoverished and violent" childhood. While there is evidence to suggest he did have a difficult childhood, family members, an obvious source of this evidence, did not want to testify. The motion for appropriate relief hearing showed Hunt gave his attorneys false information about alibi witnesses, and his participation and that of family members in witness intimidation tactics during the guilt phase of this case. Since his family members were involved in such crimes, they would obviously be readily impeached (assuming they had been willing to give testimony). Hunt's "impoverished and violent childhood" testimony, offered either by Hunt himself, or through other family members, would also have led inevitably to cross examination regarding his criminal history which included unindicted crimes, numerous armed robberies, Hunt's dynamiting his mother's house, a brutal disembowelment in prison and drug offenses. Hunt had spent essentially all of his adult life in prison, a fact which trial counsel determined, on balance, best to keep out of the capital sentencing hearing.

Hunt's claim that proof could have been presented relative to his performance as a father was likewise problematic. The natural choice for a witness to characterize Hunt as "a supportive and giving father" would be his girlfriend, Bernice Cummings. But as it turned out, Cummings had to be put in protective custody because of her fear of Hunt.

Further, she was a witness for the State and provided highly incriminating evidence at trial. As a result of her fear of Hunt and his intimidation tactics, she refused to be interviewed by Hunt's attorneys prior to trial even though Hunt repeatedly told his attorneys she would testify for **him** at trial and would not stand by the incriminating information she had given law enforcement officers which was contained in her statements provided by the State in discovery. Cummings had been solicited to engage in witness intimidation by Hunt. Additionally, any evidence of Hunt as a good father would, of necessity, bring his quantity of prison time, and the reasons for it, to the fore, which would be deleterious to his mitigation case.

As to the possibility of evidence regarding Hunt's performance as a "dependable and hardworking employee," Hunt's counsel interviewed a former employer and concluded that such testimony would likely be a two-edged sword. Although Hunt's employer liked Hunt, and felt he was a good worker, he also was afraid of Hunt, and would testify that the reason Hunt got along with other workers was that no one at work would dare cross Hunt.

Hunt's assertion that counsel should have introduced evidence of his "good behavior in prison" is likewise flawed. Hunt's allegedly good behavior in prison would have proven an evidentiary landmine, which his trial team wisely sidestepped. Aside from the obvious fact that incarceration in prison is not really a recommendation as to a defendant's character, Hunt's behavior in prison was particularly disturbing. First, virtually

all of Hunt's witness intimidation schemes were directed from jail, evidence which allowed the reasonable inference Hunt was about as dangerous in prison as out. Next, prison records contained details of Hunt's criminal history which would have fleshed out the bare records of conviction. For example, regarding the dynamiting conviction, prison records document Hunt held a "deep resentment against his mother and Campbell (his mother's companion) and it was his heart's desire to hurt his mother and Campbell in some way." Hunt's post-conviction counsel called prison guards at the MAR supposedly to show he adjusted well to a structured environment. Their strategy failed miserably when the state brought out through a prison guard the fact Hunt had used a shank to gut a fellow inmate in prison. The witness testified that Hunt "hit [another prisoner] with a shank in the pit of his stomach . . . (and) his intestines was coming out." (Pet. App. at 52a)

Finally, Hunt complains that trial counsel should have introduced evidence from a psychiatrist regarding his emotional and mental disturbances. But that option was not available to trial counsel **because Hunt rejected the suggestion to utilize a psychiatrist.** Hunt's trial attorneys discussed with Hunt, and his sister, any psychological, mental, or substance abuse problems Hunt may have experienced. Hunt was adamant he did not want to be examined by a mental health professional. As noted in *Clanton v. Bair*, 826 F.2d 1354, 1358 (4th Cir. 1987), when a seemingly lucid and rational client rejects the suggestion of a psychiatric evaluation and there is no indication of a mental or emotional problem, a trial lawyer may reasonably forego insistence upon an examination. *See Proffitt*

v. United States, 582 F.2d 854 (4th Cir. 1978); *Ex rel. Rivera v. Franzen*, 794 F.2d 314, 316-17 (7th Cir.), *cert. denied*, 479 U.S. 991 (1986). There is no constitutional basis for a rule that would require a psychiatric evaluation in every capital case. *See Springer v. Collins*, 586 F.2d 329, 332-33 (4th Cir. 1978), *cert. denied*, 440 U.S. 923.

Accordingly, the courts below were required to assess the trial attorneys' actions and decisions for reasonableness in light of the statements Hunt was making to them, his actions in trying to destroy evidence and quiet potential witnesses, Hunt's prior bad acts and criminal convictions, and the exposure on cross examination of all witnesses on these topics. In light of these circumstances facing trial counsel at the penalty phase of Hunt's trial, Hunt's contention that counsel "presented no argument whatsoever" regarding Hunt's individual circumstances, and that this failure to argue the case resulted from a failure to investigate potential mitigation, is patently inaccurate. Trial counsel presented argument that Hunt had a family and had no choice in the matter of his punishment. Counsel further argued that in Hunt's prior convictions there was no evidence Hunt personally used violence toward any person. (Pet. App. at 63a-65a) Strategically, trial counsel could not venture further into Hunt's individual circumstances, as a result of the nefarious facts of Hunt's background and character noted above.

In support of this petition, Hunt argues the Fourth Circuit's decision in this matter directly conflicts with the decision of the Seventh Circuit in *Hall v. Washington*, 106 F.3d

742 (7th Cir.), *cert. denied*, 522 U.S. 907 (1997). Hunt alleges trial counsel's "generalized plea for mercy" contained "no argument whatsoever that petitioner's individual circumstances did not warrant execution." (Pet. App. at 5, 11) Relying on *Hall*, Hunt argues failure to "tailor" sentencing arguments to the defendant's specific circumstances constitutes professionally unreasonable assistance. The opinion of the Fourth Circuit in Hunt's case is not in conflict with the decision in *Hall* because the facts in *Hall* are absolutely distinguishable from the facts in the case at bar. First, trial counsel in Petitioner's case did reference Hunt's individual facts in closing argument, inasmuch as it was prudent to do so in light of Hunt's abysmal record of criminal conduct prior to, and during, the trial in this case. Trial counsel did not rely solely on an all out assault on the death penalty, rather, counsel focused on issue four to urge the jury that the aggravating circumstances were not sufficiently substantial to warrant the death penalty in light of mitigating evidence. The most glaring distinction between *Hall* and the case at bar, however, is that in *Hall* the relationship between counsel and Hall was nothing short of horrible. Hall would not cooperate with counsel, he assaulted one of his attorneys, and several times petitioned the court to remove his trial counsel from his case. This animosity led to trial counsel's utter failure to independently investigate potential mitigating evidence and failure to follow leads provided by information that came to them in the course of representing Hall. As a result, the Seventh Circuit found that counsel's deficient argument - - failure to focus on individual circumstances of Hall - - in the penalty phase was due to counsel's failure to conduct a reasonably professional

investigation - - really, no investigation at all. In the case at bar, however, trial counsel conducted a professionally reasonable investigation but were stymied in their efforts by Hunt's conduct and social history. Moreover, the Seventh Circuit seemed genuinely concerned in *Hall* with the fact trial counsel reported to the court that Hall would waive a jury in the penalty phase after only consulting with Hall for 40 seconds.

In contrast, here trial counsel investigated readily available sources of mitigating evidence (Hunt, family members, and an employer), and pursued other sources (attempting to interview Hunt's girlfriend, codefendants, and other witnesses) but met roadblocks set in place by Hunt's witness intimidation tactics. In *Hall*, the attorneys did not focus on individual circumstances related to Hall because they never looked for any - - they conducted no investigation into mitigation. In Hunt's case, trial counsel investigated mitigation but trial counsel's ability to focus on individual circumstances related to Hunt was limited due to Hunt's actions, character and background. Thus, the facts of *Hall* are glaringly distinguishable from the case at bar and *Hall* does not support Hunt's contention there is any conflict in the circuit courts over penalty phase arguments in capital cases. For the reasons argued above, there is no conflict among the circuit courts on this issue and Hunt's petition to review this claim should be denied.

II. The Court of Appeals' Disposition of Hunt's Ineffective Assistance of Counsel Claim Is Not In Conflict with Decisions of This Court.

By this claim, Hunt argues trial counsel provided IAC in closing argument by relying on "general moral and religious" themes and failing to "present any legal argument cognizable in the state's sentencing scheme" in support of a verdict of less than death. (Pet. at 13) Hunt contends the Fourth Circuit's decision that the superior court's disposition of this claim was not an unreasonable application of established federal law is in conflict with decisions of this Court and thus warrants issuance of the writ. The State contends the decision below on this claim does not conflict with precedent of this Court and Hunt's claims to the contrary are without merit.

The state superior court found that "counsel's argument contained conventional themes often heard in death penalty cases and sought to present reasons to the jury why Hunt was not deserving of death." (Pet. App. at 20a) In reviewing major points of counsel's closing, the Fourth Circuit observed:

> Hunt's counsel pointed out to the jury that the prosecutor had "talked to you about death. I will talk to you about life." He then turned to the larger philosophical, moral and religious questions about life and death and requested the jury, in answering issue four on the verdict form, to find for life: "[The prosecutor], in all his grandeur, would suggest to you that Henry

> Lee Hunt should receive the death penalty and with equal grandeur, I will ask the question, 'Should he?' and I suggest to you that the answer is a resounding no . . . You know, I understand that with all of life's human failures, and recognize, that with all of life's human short comings that to impose such a penalty of death is cruel and unnecessary." Hunt's counsel then appealed for mercy for Hunt and his family: "Both Jackie Ransom and Larry Jones, I'm sure, left loved ones with tears and with sorrows. . . . You know, Henry Lee Hunt has a family, and, you know, today, Henry Lee Hunt doesn't have a choice, but you do. . . . If you want to punish Henry Lee Hunt, I suggest to let him live. You cannot punish him when he's dead." Focusing particularly on the fourth interrogatory submitted to the jury, Hunt's attorney stated: "I want you to think about whether any aggravating circumstances are sufficiently substantial for you to take this man's life in either one of those cases . . . Now, his honor will instruct you that even if you find aggravating circumstances and no mitigating circumstances, you will still have a chance to answer Issue Number Four no."

Hunt v. Lee, 291 F.3d at 293.

Relying on *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Penry v. Lynaugh*, 492 U.S. 302 (1989), Hunt argues "punishment should be directly related to the personal culpability of the defendant," and the jury "must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." (Pet. at 12-13) Hunt asserts the Fourth Circuit's decision on the IAC claim related to jury argument is in conflict with *Woodson* and *Penry* because, according to Hunt, the Fourth Circuit held "North Carolina law provides juries discretion to consider general moral and religious arguments in capital sentencing." (Pet. at 13)

The simple answer to Hunt's contention is that it fails to acknowledge the full context of the Fourth Circuit's basis for affirming the district court. Hunt concedes he "never argued that it is impermissible for counsel to raise general moral and religious themes." (Pet. at 13) While acknowledging trial counsel did incorporate these themes in his argument, the Fourth Circuit also acknowledged trial counsel "elected . . . to focus on interrogatory four that allowed the jury, after weighing the factors, to find that . . . the aggravating circumstances were not sufficient to justify the death penalty." (Pet. App. at 57a) *See State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865 (1983) (setting forth the order and form of the issues to be submitted to the jury in capital trials). This analysis of the law was entirely correct and does not conflict with *Woodson* or *Penry*. Under N.C. GEN. STAT. §15A-2000(c) and *State v. McDougall*, after weighing aggravating circumstances against any mitigating circumstances found by

one or more of the jurors, the jury can not impose the death penalty unless it finds beyond a reasonable doubt the aggravating circumstances are sufficiently substantial, when considered together with any mitigating circumstances, to call for imposition of the death penalty. The Fourth Circuit correctly noted the focus of trial counsel's argument was issue four. Though trial counsel had investigated mitigating evidence, they made a strategic decision not to put on evidence because there was a wealth of damaging evidence which would have come before the jury related to Hunt's record and character if they opened the door. Thus, trial counsel identified the evidence to support a mitigation argument related to Hunt's individual character - Hunt being a man with a family, his robbery convictions had not been shown to have involved Hunt using violence against another person - and urged the jury to consider that evidence in deciding issue four. Consistent with *Penry,* the jury had a vehicle, N.C. GEN. STAT. §15A-2000(f)(9), the catchall mitigating circumstance, to consider the evidence, and make "a reasoned moral response to the defendant's background, character, and crime." Moreover, North Carolina law guided the sentencer's discretion by directing them in Issue Four to determine whether the aggravating circumstances in the case were sufficiently substantial to require the death penalty. To the extent the trial counsel's argument also urged mercy or sympathy for Hunt in the decision process on issue four, Hunt appears to concede this Court's precedent would not prevent a jury from considering mercy or sympathy rooted in the mitigating evidence. *Gregg v. Georgia*, 428 U.S. 153 (1976); (Pet. at 15).

Thus, contrary to Hunt's contention, trial counsel did present a cognizable legal argument in penalty phase. The focus on issue four was just such an argument. There is no conflict, therefore, between the Fourth Circuit's decision in the case at bar and this Court's precedent. In its entirety, trial counsel's argument was professionally reasonable and the superior court's determination that Hunt did not establish IAC is not an unreasonable application of federal law. For these reasons, Hunt's petition should be denied.

III. Hunt's *Brady* Claim is Without Merit.

This is the second time Hunt has brought a *Brady* claim based on the same identical evidence before this Court in a petition for writ of certiorari. Hunt's *Brady* claim based on this evidence was the subject of Hunt's petition which the Court denied in *Hunt v. North Carolina*, 522 U.S. 861 (1997). In the petition at bar, Hunt again complains that he was denied exculpatory or impeachment evidence, and now argues the court of appeals utilized too narrow a standard for determining when evidence is favorable to the accused in order to trigger *Brady's* protections. Hunt contends the court of appeals' treatment of this claim is in conflict with decisions of this Court. Specifically, Hunt argues that the state was required to disclose to Hunt that in discussions between Larry Jones (Hunt's second murder victim) and police, Jones never specifically named Hunt as Ransom's killer. Both the District Court and the Court of Appeals utilized the proper standard of review under *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976) and *Kyles v. Whitley*, 514

U.S. 419 (1995); (Pet. App. at 21a-24a, 59a-60a). Contrary to Hunt's assertion, the Court of Appeals did not adopt an overly narrow view of *Brady* in affirming the action of the superior court.

In the case at bar, the failure of Jones to name Hunt as Ransom's killer to Sampson and Stogner does not exculpate Hunt. Jones was living in the same residence as Aggie Nora Hunt, Petitioner's sister, a fact she was reluctant to disclose to trial counsel. Part of the reason Aggie Nora did not want to testify at trial was she was afraid of being implicated about going to Hunt and telling him Jones had been talking to the police. Her report to Hunt on Jones' contacts with investigators was confirmed by Bernice Cummings at trial when she testified that on September 14, 1984, Aggie Nora and Annie Ruth (another sister of Hunt) came to Hunt's residence. While there, Annie Ruth and Hunt had a conversation in a back room after which Hunt emerged stating, "Jones was running his mouth and he was going to put a stop to it." Thus, the evidence shows Hunt knew Jones was being contacted by investigators and Hunt stated he believed Jones was talking to them about the Ransom murder. Hunt's own family members and friends were reporting Jones' actions to Hunt. The relevant feature of the evidence is what Hunt thought and said about Jones' contacts with law enforcement officers, not what Jones may or may not have said to Sampson and Stogner. Consequently, the evidence in question is not exculpatory as the superior court correctly found.

Moreover, the evidence does not impeach the State's theory of motive. At worst, from the State's perspective, it is neutral on the theory. It does not show Hunt did not kill Jones in order to stop Jones from "running his mouth." The State is not required by *Brady* to disclose possible theories of the defense to a defendant. If a statement or evidence is not exculpatory or impeaching, the State need not produce the evidence. To hold otherwise would impose an insuperable burden on the State to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning. *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988). As the Fourth Circuit noted, Hunt's argument regarding this evidence "overlooks the State's theory that Hunt killed Jones because Hunt *believed* that Jones was talking to the police and telling them that Hunt killed Ransom." (Pet. App. at 60a) The only thing that was important about the conversation was that it **occurred**. There is simply no view of the evidence, reading *Brady*, *Agurs* and *Kyles* as broadly as possible, that could lead a reasonable jurist to the conclusion that the content of the discussions between Jones and police were exculpatory or even useful as impeachment evidence. Moreover, in light of the overwhelming evidence of guilt and in support of the death sentences, had the content of the conversations been turned over, there is no "'reasonable probability' of a different result" *Kyles*, 514 U.S. at 434. As such, no further consideration is required. The evidence is either inculpatory or neutral. Hunt has offered absolutely no argument which makes his claim of a reasonable probability of a different result at trial even remotely plausible. Because Hunt has failed to show the court of appeals' disposition of this claim

conflicts with decisions of this Court, Hunt's petition to review this claim should be denied.

CONCLUSION

For the reasons stated herein, the Court should deny Hunt's Petition for Writ of Certiorari.

Respectfully submitted, this the 23rd day of October, 2002.

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FILED
OCT 31 2002
OFFICE OF THE CLERK

No. 02-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

HENRY LEE HUNT,

Petitioner,

—*v.*—

R.C. LEE,
Warden, Central Prison, Raleigh, North Carolina,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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October 31, 2002

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REPLY TO BRIEF IN OPPOSITION

The State of North Carolina seeks to execute petitioner despite his appointed trial counsel's woeful abdication of their duty to present any defense on his behalf at sentencing. Had petitioner been convicted within the Seventh Circuit rather than the Fourth Circuit, his counsel's numerous egregious failures would prevent his execution absent a new sentencing hearing. In its Brief in Opposition, the State attempts to avoid this circuit split by alleging two minor factual differences between this case and the Seventh Circuit's decision in *Hall* v. *Washington*, 106 F.3d 742 (7th Cir. 1997)—but comparison of this case to *Hall* weighs in favor of granting certiorari. The State also erroneously asserts that petitioner's counsel briefly mentioning his name twice during closing argument satisfies this Court's requirement that counsel's sentencing presentation inform the jury of the defendant's individual circumstances. That assertion is equally unfounded.

The State also seeks to execute petitioner despite its refusal to disclose to petitioner's counsel various documents that were inconsistent with the State's theory of the case, in violation of *Brady* v. *Arizona*, 373 U.S. 83 (1963). In responding to petitioner's *Brady* claim, the State adopts an overly narrow definition of "evidence favorable to an accused" and flatly ignores the requirement that impeachment evidence be disclosed.

Argument

I.

The State Does Not Dispute That the Legal Principles Applied in This Case and in the Seventh Circuit's *Hall* v. *Washington* Decision Differ.

The State cannot and does not dispute that the Fourth Circuit's holding in this case conflicts with that of the Seventh Circuit in *Hall*. Instead, the State offers a pair of illusory factual distinctions. The State argues, first, that counsel in *Hall* did not refer in closing to the defendant's individual circumstances, as counsel did here, and, second, that the defendant's animosity toward counsel in *Hall* prevented a constitutionally effective investigation of potential mitigating circumstances. (BIO at 13.) In fact, however, the Seventh Circuit's opinion makes clear that counsel in *Hall* did refer to the defendant's individual circumstances in closing and that counsel offered mitigating evidence at sentencing, which is something petitioner's counsel utterly failed to do. *See Hall*, 106 F.3d at 750. The State's attempt to distinguish the two cases by highlighting minor factual differences thus backfires: As demonstrated below, counsel's performance in *Hall* compares favorably to counsel's performance here.

The State does not dispute that the Seventh Circuit ruled in *Hall* that, to provide constitutionally effective representation at capital sentencing, "counsel must present an argument that focuses the sentencer's attention" on "'the character and record of the individual offender and the circumstances of the particular offense.'" *Id.* at 750 (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976)). Nor does the State dispute that, as in *Hall*, counsel here focused their sentencing presentation almost entirely on generalized moral and religious arguments, not on any facts about the defendant or the circumstances of the case. *Cf. id.* Nor does the State dispute that, as in *Hall*, counsel here declined to rely "on the specific weighing of aggravating and mitigating circumstances" (57a). *Cf. Hall*, 106 F.3d at 747. Finally, the State does not dispute that counsel here, as in *Hall*, relied primarily on arguments categorically opposing the death penalty, asserting that only God could rightly impose a death sentence, and condemning capital punishment as inconsistent with the fundamental tenets of Christianity (63a-65a, 67a, 71a). *Cf. Hall*, 106 F.3d at 747.

Instead, the State attempts to distinguish *Hall* from the instant case by asserting, first, that while counsel here "did reference [petitioner's] individual facts," counsel for Hall did not do so; and, second, that Hall refused to cooperate with his counsel and thus prevented an adequate investigation of potential mitigating circumstances, while counsel here engaged in such an investigation. (BIO at 13.) The former assertion is demonstrably false. As to the latter, the Seventh Circuit ruled that counsel's relationship with the defendant was irrelevant to the court's decision, and in any event, counsel in *Hall* at least put on a case in mitigation, unlike counsel here.

The State's attempt to distinguish this case from *Hall* based on counsel's fleeting references to petitioner—

naming him twice and saying he has a family, hardly a circumstance unique to petitioner—ignores the attempt by Hall's counsel to rely on similar references, only to be rebuffed by the Seventh Circuit. *See Hall*, 106 F.3d at 750. The Seventh Circuit rejected counsel's "mention of Hall's particular character and history" on the ground that it "was pure boilerplate that could have been said of the majority of capital defendants." *Id.* That rejection should apply with equal force here. The transcript of the closing argument by petitioner's counsel comprises 333 lines of text, and yet the State can point to only three sentences that even nominally refer to petitioner's individual circumstances: (i) that petitioner had a family; (ii) that petitioner had no say in his sentencing; and (iii) that petitioner's prior convictions did not demonstrate that he used violence against any person. (BIO at 12; *see* 63a-64a.)

These statements cannot bear the weight the State places on them. If the simple statements that petitioner "has a family" and that he has no say in his sentencing are not "pure boilerplate that could have been said of the majority of capital defendants," then nothing is. With regard to the third point, petitioner's counsel conceded that the court would instruct the jury as to that very fact. (64a.) Such glancing allusions to petitioner do not distinguish this case from *Hall*. To the contrary, they only reinforce the similarity between petitioner's case and *Hall*.

In any event, the State's attempt to demonstrate that *Hall* involved representation less individualized than the representation petitioner received must fail: Counsel in *Hall* not only offered up boilerplate references to the defendant's individual circumstances—counsel there also introduced mitigating evidence by putting on two witnesses. *See* 106 F.3d at 747. Petitioner's counsel introduced *no* mitigating evidence.

The State also argues that this case differs from *Hall* because the failure of Hall's counsel to present a fuller case in mitigation was the result of counsel's "horrible" relationship with Hall, which prevented a thorough investigation into potential mitigating circumstances. (BIO at 13.) Although the State labels this "[t]he most glaring distinction between *Hall* and the case at bar" (*id.*), the Seventh Circuit ruled that Hall's relationship with his counsel had no effect on counsel's performance at sentencing. *See Hall*, 106 F.3d at 751. Moreover, despite the State's claims to the contrary, counsel in *Hall* could not have eschewed *all* investigation of mitigating circumstances, given that they put on two witnesses at sentencing. Just as counsel in *Hall* declined to engage in a sufficient investigation of potential mitigating circumstances, so too counsel here interviewed only a few potential witnesses and failed inexplicably to pursue many promising leads. Here, however, unlike in *Hall*, counsel failed to put on *any* case in mitigation.

Finally, the State does not dispute that constitutionally effective assistance of counsel requires the presentation of a defense at sentencing that is individualized to the defendant's circumstances. Instead, the State offers the novel argument that because petitioner and his family allegedly engaged in a pattern of witness intimidation, and because petitioner had allegedly alienated many (but not all) of the potential witnesses on his behalf (after all, many of them appeared at the hearing in state court on petitioner's motion for appropriate relief), petitioner had effectively waived his right to an individualized defense. (BIO at 7-12.) Such an argument was explicitly rejected in *Hall*. *See Hall*, 106 F.3d at 751 (rejecting "a hint . . . that Hall waived the right to effective assistance of counsel through his own misconduct"). The Seventh Circuit ruled that "[w]hile Hall was certainly not an ideal client, counsel were still required to provide constitutionally adequate representation until such time as the court excused them."

Id. The State's spurious reliance on an alleged implicit waiver of the effective assistance of counsel required by the Sixth Amendment serves only to emphasize the similarity of the two cases.

II.

Counsel's Boilerplate References to the Defendant Do Not Satisfy This Court's Requirement That a Capital Defendant's Individual Circumstances Be Presented to the Jury.

The State does not dispute that petitioner's trial counsel presented no case in mitigation, or that they relied almost entirely on moral and religious arguments against the death penalty. Nor does the State dispute that petitioner's trial counsel failed to argue that petitioner's specific circumstances were insufficient to warrant execution. Finally, the State does not dispute that petitioner was prejudiced by his counsel's deficient performance, because the submission to the jury of even a single mitigating circumstance would have entitled petitioner to a new sentencing hearing under the standard this Court found to be constitutionally mandated in *McKoy* v. *North Carolina*, 494 U.S. 433 (1990).

Instead, the State argues that counsel's passing references to petitioner, boilerplate though they were, were sufficient to present petitioner's individual circumstances to the jury. (BIO at 17-19.) But from the entire sentencing phase of trial, the only references to petitioner's individual circumstances are counsel's assertions that petitioner "has a family" and that his prior convictions did not evidence the use of violence against any person (again, a fact that counsel conceded the judge would have pointed out to the jury anyway). (*Id.* at 18.) It is absurd to contend—as the State does here—that these two naked references, standing

alone, are sufficient to satisfy counsel's "constitutionally indispensable" role of providing the jury with a defense at sentencing that gives "consideration [to] the character and record of the individual offender and the circumstances of the particular offense." *Woodson*, 428 U.S. at 304. Nor do these two boilerplate references to petitioner ensure that his sentence is "directly related to the personal culpability of the defendant" and "a reasoned moral response to the defendant's background, character, and crime." *Penry* v. *Lynaugh*, 492 U.S. 302, 319, 327 (1989).

The State further argues that by appealing to general moral and religious themes, counsel was focusing the jury on Issue Four of the jury form, which asked whether the aggravating circumstances were sufficiently substantial to justify execution. (BIO at 17.) The State then points out that petitioner does not dispute that "this Court's precedent would not prevent a jury from considering mercy or sympathy *rooted in the mitigating evidence*." (*Id.* at 18 (citing *Gregg* v. *Georgia*, 428 U.S. 153 (1976)) (emphasis added).) Even a cursory examination of counsel's closing argument reveals, however, that the "mercy and sympathy" counsel urged in this case were *not* "rooted in the mitigating evidence" (because counsel had presented none), and thus were plainly outside the realm of permissible jury considerations.

III.

The State Provides No Support for the Overly Narrow Construction of "Evidence Favorable to an Accused" that Was Adopted by the Fourth Circuit.

The State does not dispute that its theory as to why petitioner allegedly killed Larry Jones was that Jones was telling the police of petitioner's purported involvement in Jackie Ransom's murder. The State also does not dispute

that it did not disclose to petitioner the officers' notes of their conversations with Larry Jones or that those handwritten notes were destroyed, in one case after petitioner requested their production. The State further does not dispute that it was aware of the inconsistency between the officers' notes and the impression the prosecution sought to convey to the jury, and that the State therefore should be held to a high standard of materiality. Finally, the State does not dispute that the officers' notes would have been useful in impeaching Bernice Cummings' misleading testimony.

Instead, the State urges that its production obligations are limited to evidence that is itself exculpatory. (BIO at 20.) This position is demonstrably at odds with *Brady* and its progeny. The State's restrictive view of its obligations under *Brady* is perhaps clearest when it argues that the suppressed notes are "either inculpatory or neutral." (*Id.* at 21.) It is simply impossible that the evidence in question—notes indicating that the victim had never identified petitioner as involved with the previous murder—could be considered "inculpatory." The State would limit its production obligations to evidence that conclusively exculpates a defendant—but *Brady* and its progeny dictate that the prosecution must disclose all evidence that is "favorable to an accused," *see Brady*, 373 U.S. at 87. Favorable evidence is not limited to evidence that conclusively establishes a defendant's innocence.

Finally, neither the Fourth Circuit nor the State disputes that the withheld evidence would have been useful in impeaching Bernice Cummings' testimony. By refusing to recognize the violation of petitioner's rights that resulted from this nondisclosure of important impeachment evidence, the State ignores *Bagley*'s instruction that "[i]mpeachment evidence . . . falls within the *Brady* rule." *United States* v. *Bagley*, 473 U.S. 667, 676 (1985).

CONCLUSION

The Court should grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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October 31, 2002